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Draft Model Law on Secured Transactions

Note by the Secretariat

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Chapter I. Scope of application and general provisions

Article 1. Scope of application

1. This Law applies to security rights in movable assets.

2. With the exception of articles 80-93, this Law applies to outright transfers of receivables.

3. Notwithstanding paragraph 1, this Law does not apply to security rights in:

(a) The right to request payment under or to receive the proceeds of an independent undertaking;

(b) Intellectual property in so far as this Law is inconsistent with [the enacting State to specify its law relating to intellectual property];[1]

(c) Intermediated securities;

(d) Payment rights arising under or from financial contracts governed by [close-out] netting agreements, except a payment right arising upon the termination of all outstanding transactions;

(e) Payment rights arising under or from foreign exchange transactions; and

(f) [The enacting State to set out other types of asset it wishes to exclude, such as those that are subject to specialized secured transactions and asset-based registration regimes under other law to the extent that that other law governs matters addressed in this Law].[2]

[4. This Law does not apply to security rights in proceeds of encumbered assets if the proceeds are a type of asset that is outside the scope of this Law to the extent that [the enacting State to specify any other law] applies to security rights in those types of asset and governs the matters addressed in this Law.]

5. [Nothing in this Law affects the application of] [This Law is subject to] laws relating to the protection of parties to transactions made for personal, family or household purposes.

6. [Nothing in this Law overrides a provision of any other law that limits the creation or enforcement of a security right in, or the transferability of, specific types of asset, with the exception of a provision that limits the creation or enforcement of a security right in or the transferability of an asset on the sole ground that it is a future asset, or a part or undivided interest in an asset].

[*Note to the Working Group: The Working Group may wish to consider whether certain types of outright transfers of receivables that are often excluded from the scope of secured transactions laws in several jurisdictions should also be excluded from the scope of the draft Model Law or at least discussed in the Guide to Enactment. In this regard the Working Group may wish to consider the following*

[1] This provision may not be necessary if the enacting State has coordinated, or has otherwise addressed the relationship between this Law and any secured transactions provisions of its law relating to intellectual property.

[2] If the enacting State decides to introduce any other exception(s), they should be limited and set out in the Law in a clear and specific way.

possible exclusions: (a) Outright transfers of receivables as part of a sale of a business out of which they arose, unless the seller remains in apparent control of the business after the sale: the reason for this exclusion is that the potential that the transferor will be able to mislead other buyers of the receivables is very limited unless the old owner remains in apparent control of the business. Whether this exclusion is necessary will depend on whether the Working Group considers that a transfer of receivables incidental to the sale of all the assets of a business may be interpreted as a transfer of receivables subject to the draft Model Law. (b) Outright transfers of receivables made solely to facilitate the collection of the receivables for the transferor: the reason for this exclusion is that the transferee in this type of transaction effectively acts as an agent of the transferor and not as an independent transferee capable of asserting priority over another transferee, a result that may follow from the general rules of agency in the enacting State. (c) Outright transfers of a single receivable (or negotiable instrument) made in whole or in partial satisfaction of a pre-existing indebtedness: the reason for this exclusion is that a transferee might not think of having to register such a transaction or otherwise conform to the provisions of the draft Model Law. On the other hand, this exclusion could undermine the certainty and transparency sought to be achieved through otherwise incorporating the outright transfer of even a single receivable within the registration and priority rules of the draft Model Law. (d) Outright transfers of an unearned right to payment under a contract to a person who is to perform the transferor's obligations under the contract: the reason for this exclusion is that the transferee takes the place of the transferor and thus there is no risk of deception of third parties as to who is entitled to receive payment. On the other hand, this type of transaction would seem to involve a novation of the contract and not a simple transfer of a right to payment and therefore would fall within the scope of the draft Model Law in any event. (e) Outright transfer of present or future wages, salary, pay, commission, or any other compensation for labour or personal services of an employee: the reason for this exclusion is that such transfers are typically prohibited by other law. Thus, if they are excluded, they should be excluded only to the extent they are actually prohibited by other law of the enacting State. However, their exclusion may not be necessary as the draft Model Law preserves legal prohibitions to the transferability of or the creation of a security right in an asset under other law in any event (see art. 1, para. 5). (f) Outright transfers for the general benefit of creditors of the transferor: in many common law jurisdictions, an assignment for the general benefit of creditors operates as an alternative to formal insolvency proceedings or as a device for commencing voluntary insolvency proceedings. Thus, the Guide to Enactment may need to state that enacting States that follow this approach may need to clarify that the draft Model Law does not apply to such transfers. (g) Outright transfers of a right to damages in tort: the reason for this exclusion is that the transfer of tort claims is often prohibited by law, as these claims are personal or because of concerns that their use as security for credit may increase tort actions and insurance costs or interfere with the rights of the victims of torts. In this regard, it should be noted, that, unlike the United Nations Convention on the Assignment of Receivables in International Trade *(the "*Assignment Convention*") that applies only to contractual receivables, the draft Model Law applies to all types of receivables, including a prospective award of damages in a tort claim, a right to payment under a settlement contract pertaining to a tort claim and to proceeds of a damages claim that are deposited into a bank account. Accordingly, such an exclusion may be left to each enacting*

State rather than included in the Model Law. (h) Outright transfers of an interest in or claim under a contact of insurance: the reason for this exclusion is that such transactions may be adequately covered by existing law of the enacting State. However, such an exclusion could have a negative impact on the availability of credit on the basis of insurance policy proceeds and would run counter to the policy of the Secured Transactions Guide, *which defines "proceeds" as to include insurance policy proceeds. With respect to subparagraph 3(d), the Working Group may wish to note that, unlike recommendation 4, subparagraph (d), of the* Secured Transactions Guide *which refers to "netting", subparagraph 3(d) refers to "close-out netting". The Working Group may wish to note that the Guide to Enactment will explain that this change of wording is necessary to ensure that transactions relating to set off even between two sellers of goods with trade claims and counter-claims would not be inadvertently excluded (see A/CN.9/830, para. 20). With respect to subparagraph 3(e), the Working Group may wish to consider whether the exclusion of payment rights arising under or from financial contracts governed by [close-out] netting agreements in subparagraph 3(d) is sufficient to cover also payment rights arising under or from foreign exchange transactions addressed in subparagraph 3(e) and, if so, whether subparagraph 3(e) should be deleted. The Working Group may wish to consider subparagraphs 3(d) and (e) together with the definitions of the terms "financial contract" and "[close-out] netting" in article 2, which are based on the definitions of those terms contained in article 5 of the* Assignment Convention. *With respect to paragraph 6, the Working Group may wish to consider the bracketed wording, which is intended to ensure that statutory limitations to the transferability of future assets, parts of and undivided interests in assets is overridden by the draft Model Law (see also recommendation 23 of the* Secured Transactions Guide, *which has not been reflected in any article of the draft Model Law).*]

Article 2. Definitions and rules of interpretation

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will also refer to other rules of interpretation, such as the following: (a) the word "or" is not intended to be exclusive; (b) the singular includes the plural and vice versa; and (c) the words "include" or "including" are not intended to indicate an exhaustive list (see* Secured Transactions Guide, *Introduction, para. 17).*]

For the purposes of this Law:

(a) "Acquisition secured creditor" means a secured creditor that has an acquisition security right;

(b) "Acquisition security right" means a security right in a tangible asset, intellectual property or the rights of a licensee under a licence of intellectual property that secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire it [to the extent the credit is in fact applied for that purpose];

[*Note to the Working Group: The Working Group may wish to note that the term "tangible asset" throughout the draft Model Law means tangible assets in the strict sense, including consumer goods, equipment and inventory and excluding money, negotiable instruments, negotiable documents and certificated*

non-intermediated securities (see definition of "tangible asset" below). However, all types of asset that may be subject to physical possession are included in the definition of the term "possession" below. The Working Group may also wish to consider the wording within square brackets in this definition, which is intended to ensure that a security right qualifies as an acquisition security right only if the credit provided for the purpose of acquiring the encumbered asset is in fact used for that purpose. The Working Group may further wish to consider whether it is redundant to refer to "an obligation incurred or credit otherwise provided" or whether it is sufficient to simply refer to "other credit extended". The Working Group may also wish to consider whether the Guide to Enactment should explain that, where a security right secures obligations in addition to the credit extended and used for the purpose of acquiring the encumbered asset, it is an ordinary security right to the extent of those additional obligations.]

(c) "Bank account" means an account[, other than a securities account,] maintained by a bank, to which funds may be credited or debited. The term includes a checking or other current account, as well as a savings or time deposit account. The term does not include a right against the bank to payment evidenced by a negotiable instrument;

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in this definition, which is intended to draw a clear distinction from a securities account in which funds are routinely credited or debited when transactions relating to securities credited to those accounts are settled. Alternatively, this distinction may be explained in the Guide to Enactment, which can explain that, to underline this distinction, the draft Model Law defines the term "securities account" as "an account maintained by an intermediary to whom securities may be credited or debited" and the term "securities" in a manner that clearly excludes funds. The Working Group may further wish to consider whether it is appropriate to retain the second sentence of this definition since the terms "checking or other current account" and "savings or time deposit account" are business terms rather than legal terms and therefore may not be used in all enacting States or have the same meaning in all enacting States. These terms may instead be used in the Guide to Enactment as examples. The Guide to Enactment will also explain that the enacting State may wish to include a definition of the term "bank" in its secured transactions law or rely for this purpose on other law.*]

(d) "Certificated non-intermediated securities" means non-intermediated securities represented by a certificate that:

(i) Provides that the person entitled to the securities is the person in possession of the certificate; or

(ii) Identifies the person entitled to the securities;

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that the term "represented" is broad enough to cover the approaches taken in different jurisdictions and that the term "certificate" means only a tangible document subject to physical possession.*]

(e) "Competing claimant" means a creditor of a grantor or other person with rights in an encumbered asset that may be in conflict with the rights of a secured creditor in the same encumbered asset and includes:

(i) Another secured creditor of the grantor that has a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);

(ii) Another creditor of the grantor that has a right in the same encumbered asset, such as a judgement creditor or [the enacting State to specify creditors that have a right in the encumbered asset under other law];

(iii) The insolvency representative in insolvency proceedings in respect of the grantor; or

(iv) A buyer [or other transferee], lessee or licensee of the encumbered asset;

[*Note to the Working Group: The Working Group may wish to note that the text in square brackets in subparagraph (e)(iv) has been included to align this definition with the formulation of other articles (see, for example, arts. 42 and 43). The Working Group may also wish to note that, if the bracketed text is to be retained, its position may have to be reconsidered as in some jurisdictions lessees and licensees are considered transferees.*]

(f) "Consumer goods" means goods [primarily] used or intended to be used by a physical person for personal, family or household purposes;

[*Note to the Working Group: The Working Group also may wish to add the word "primarily" to this definition to cover the case where goods are used by the grantor for both business and personal purposes in which event the primary use would determine whether they qualify as consumer goods. The Working Group may also wish to consider whether the definitions of the terms "equipment" and "inventory" should also be revised to refer to tangible assets* "primarily used or intended to be used ... ".]

(g) "Control agreement":

(i) With respect to uncertificated non-intermediated securities means an agreement in writing among the issuer, the grantor and the secured creditor, according to which the issuer agrees to follow instructions from the secured creditor with respect to the securities without further consent from the grantor; and

(ii) With respect to rights to payment of funds credited to a bank account means an agreement in writing among the depositary bank, the grantor and the secured creditor, according to which the depositary bank agrees to follow instructions from the secured creditor with respect to the payment of the funds credited to the bank account without further consent from the grantor;

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) the enacting State may wish to add a reference to its requirements for the authorization of an agreement (e.g. signature); and (b) a control agreement does not need to be in a single writing.*]

(h) "Debtor" means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security right secured by that obligation. The term includes a secondary obligor such as a

guarantor of a secured obligation, and a transferor in an outright transfer of a receivable;

(i) "Debtor of the receivable" means a person that owes payment of a receivable. The term includes a guarantor or other person secondarily liable for payment of the receivable;

(j) "Encumbered asset" means a tangible or intangible movable asset that is subject to a security right. The term includes a receivable that is the subject of an outright transfer;

(k) "Equipment" means a tangible asset [primarily] used [or intended to be used] by a person in the operation of its business;

(l) "Financial contract" means a contract relating to any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to those transactions entered into in financial markets and any combination of those transactions;

(m) "Future asset" means a tangible or intangible movable asset, which does not exist or which the grantor does not have rights in or the power to encumber at the time the security agreement is concluded;

(n) "Grantor" means a person that creates a security right to secure either its own obligation or that of another person. The term includes the transferor in an outright transfer of a receivable;

(o) "Independent undertaking" means an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

[*Note to the Working Group: The Working Group may wish to note that this definition is based on the definition contained in article 2, paragraph (1) of the* United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.]

(p) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(q) "Intangible asset" means all forms of movable assets other than tangible assets. The term includes receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank account, money, negotiable instruments, negotiable documents and non-intermediated securities;

[*Note to the Working Group: The Working Group may wish to note that, in view of the narrow definition of the term "tangible asset" (in line with the way it is*

used in the draft Model Law), the definition of the term "intangible asset" includes some types of asset that may be subject to physical possession and thus are included in the definition of the term "possession". The Working Group may wish to consider the use of the terms "intangible asset", "possession" and "tangible asset", and consider whether these definitions should be revised.]

(r) "Inventory" means tangible assets [primarily] held by a person for sale or licence in the ordinary course of the grantor's business. The term includes raw and semi-processed materials (work-in-process);

(s) "Knowledge" means actual knowledge;

(t) "Mass or product" means tangible assets other than money that are so physically associated or united with other tangible assets that they have lost their separate identity;

(u) "Money" means currency currently authorized as legal tender by any State. The term does not include funds credited to a bank account or negotiable instruments;

[*Note to the Working Group: The Working Group may wish to note that the term "money", whose definition is based on a definition contained in the* Secured Transactions Guide, *is intended to include not only the national currency of the enacting State but also foreign currency. The Working Group may wish to consider deleting the word "currently" in this definition as redundant (since if currency is not "currently authorized" as "legal tender", then it would not qualify as "legal tender"). The Working Group may also wish to consider deleting the second sentence of the definition since rights to payment of funds credited to a bank account and negotiable instruments are recognized as distinct concepts in the draft Model Law and thus it is already clear that the concept "money" does not include them. All these matters may be usefully discussed in the Guide to Enactment.*]

(v) "Non-intermediated securities" means securities other than securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account;

[*Note to the Working Group: The Working Group may wish to note the Guide to Enactment will explain that the term "non-intermediated securities" does not include the rights of an intermediary or a competing claimant in securities held by the intermediary directly against the issuer because those securities are credited by the intermediary to a securities account in the name of the grantor and therefore qualify as intermediated securities for the purposes of that transaction.*]

(w) "[Close-out netting] [Netting] agreement" means an agreement between two or more parties that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (ii) under two or more netting agreements;

(x) "Notice" means a communication in writing;

[*Note to the Working Group: In view of the definitions of the term "notice" in the* Secured Transactions Guide *and in the* UNCITRAL Guide on the Implementation of a Security Rights Registry *(the "*Registry Guide*") and to avoid any ambiguity between a notice registered in the general security rights registry and a notice of enforcement, the Working Group may wish to consider whether a new term should be introduced and defined in this article to reflect a notice to be registered in the general security rights registry, while the current definition of the term "notice" could be retained to refer to other types of notice (e.g., given in the context of enforcement). The new term could be "security right notice" or "registry notice" and be defined along the following lines: "means a communication to the Registry in writing in the form prescribed by the [Registry] [Regulation] [other Law relating to the registration of notices of security rights]". Alternatively, wording along the following lines could be included in the definition of the term "notice": "and, in the context of the provisions in this Law that govern the registration of a notice in the security rights registry, means a communication in writing in the form prescribed by the [Registry] [Regulation] [other Law relating to the registration of notices of security rights".*]

(y) "Notification of a security right in a receivable" means a notice by the grantor or the secured creditor informing the debtor of the receivable that a security right has been created in the receivable. A notification of the security right may include a payment instruction;

[*Note to the Working Group: The Working Group may wish to note that the requirement for the identification of the encumbered receivable and the secured creditor that was included in a previous version of this definition (and in this definition in the* Secured Transactions Guide*), was moved to article 70, paragraph 1, as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in article 70, paragraph 1. The Working Group may wish to consider whether the second sentence of this definition also states a substantive rule and should be moved to article 70.*]

(z) "Possession" means the actual [physical] possession of a tangible asset, money, negotiable instruments, negotiable documents and certificated non-intermediated securities by a person or its representative, or by an independent person that acknowledges holding it for that person;

[*Note to the Working Group: The Working Group may wish to note that the definition of "possession" has been revised to refer to all types of tangible asset that may be subject to physical possession (see definitions of terms "tangible asset" and intangible asset").*]

(aa) "Priority" means the right of a secured creditor to derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant;

(bb) "Proceeds" means whatever is received in respect of an encumbered asset. The term includes what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, civil and natural fruits,

insurance proceeds, claims arising from defects in, damage to or loss of an encumbered asset, and proceeds of proceeds;

[*Note to the Working Group: The Working Group may wish to consider whether the definition of the term "proceeds" should be limited to proceeds received by the grantor, and not extend to proceeds received, for example, by a transferee of the original encumbered asset. A different approach could potentially prejudice a third party that acquired proceeds from a transferee and had no means of knowing or finding out that the asset was the proceeds of an asset in which somebody held a security right (e.g. grantor sells the encumbered asset, a green widget, to X who then trades it in for a blue widget and then sells the blue widget to Y. Y has no means of knowing or finding out that the blue widget is subject to a security right created by the grantor/transferor). The Working Group may wish to note that the Guide to Enactment will explain that the term "civil fruits" covers revenues, dividends and distributions.*]

(cc) "Receivable" means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to receive the proceeds under an independent undertaking and a right to payment of funds credited to a bank account;

(dd) "Right to receive the proceeds under an independent undertaking" means the right to receive a payment due, a draft accepted or deferred payment incurred or another item of value, in each case to be paid or delivered by the guarantor/issuer, confirmer or nominated person giving value for a draw under an independent undertaking. The term also includes the right to receive payment in connection with the purchase by a negotiating bank of a negotiable instrument or a document under a complying presentation. The term does not include:

(i) The right to draw under an independent undertaking; or

(ii) What is received upon honour of an independent undertaking;

[*Note to the Working Group: The Working Group may wish to note that the definition of this term is included here only for the purposes of the articles in which this term is used, that is, article 1, subparagraph 3(a), under which the right to receive the proceeds is excluded from the scope of the draft Model Law, and article 1, paragraph 4, under which the proceeds of an excluded type of asset are also excluded.*]

(ee) "Secured creditor" means a creditor that has a security right. The term includes a transferee in an outright transfer of a receivable;

(ff) "Secured obligation" means an obligation secured by a security right. This term does not apply to outright transfers of receivables;

(gg) "Security agreement" means an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that creates a security right. The term also includes an agreement for the outright transfer of a receivable;

(hh) "Securities" means:

[(i)] An obligation of an issuer or any share or similar right of participation in an issuer or in the enterprise of an issuer that:

a. Is one of a class or series, or by its terms is divisible into a class or series, of obligations, shares or participations; and

b. Is, or is of a type, dealt in or traded on securities exchanges or financial markets, or is a medium for investment in the area in which it is issued or dealt in or traded; [or]

[(ii) The enacting State to specify any additional rights that should qualify as securities even if they do not satisfy the requirements expressed in subparagraphs (i) a. and (i) b;]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that each enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of this term in its securities transfer law.*]

(ii) "Securities account" means an account maintained by an intermediary to which securities may be credited or debited;

[*Note to the Working Group: The Working Group may wish to note that this definition is derived from article 1, subparagraph (c), of the Geneva Securities Convention.*]

(jj) "Security right" means a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation. The term also includes the right of the transferee in an outright transfer of a receivable;

(kk) "Tangible asset" means all forms of goods. The term includes consumer goods, equipment and inventory [but not money, negotiable instruments, negotiable documents or certificated non-intermediated securities.]

[*Note to the Working Group: The Working Group may wish to consider whether: (a) the draft Model Law should use the term "goods" to define the term "tangible asset" given that this concept has a particular legal meaning in common law jurisdictions and may not translate easily to other languages; (b) the terms consumer goods, equipment and inventory should be deleted as unnecessary and perhaps confusing since these terms do not refer to subcategories of tangible assets but rather to the way in which particular tangible assets are used by the grantor (thus, the same car could qualify as "consumer goods" if it is used by the grantor for personal purposes, or as "equipment" if it is used by the grantor in its business, or as "inventory" if the grantor happens to be a car dealer or manufacturer); (c) for greater clarity, money, negotiable instruments, negotiable documents and certificated non-intermediated securities should be excluded from this definition or (included in the definition of "intangible asset") since these types of asset are treated in some jurisdictions as tangible assets, but in the draft Model Law are subject to asset-specific rules.*]

(ll) "Uncertificated non-intermediated securities" means non-intermediated securities not represented by a certificate.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

[*Note to the Working Group: The Working Group may wish to note that, at its twenty-sixth session, it agreed that this article should be based on article 3 of the UNCITRAL Model Law on Cross-Border Insolvency or on article 38 of the Assignment Convention (see A/CN.9/830, para. 17). However, the latter provision, which refers only to international agreements and to agreements that specifically govern a transaction governed by the* Assignment Convention, *contains a rule of hierarchy among international agreements (the specific prevails over the general text) rather than a domestic law rule dealing with the prevalence of international treaties over domestic law. To explicitly preserve the application of regional law (e.g. EU directives), the Working Group may also wish to consider including in this article a second paragraph that could read along the following lines: "This Law does not affect the application of the rules of a Regional Economic Integration Organisation, whether adopted before or after this Law" (see art. 26(6) of the Hague Convention on Choice of Court Agreements of 30 June 2005).*]

Article 4. Party autonomy

1. Except as otherwise provided in articles [5, 6, 9, 62, 63, 81, paragraph 1, 47-50, 96-111], the provisions of this Law may be derogated from or varied by agreement.

2. An agreement referred to in paragraph 1 does not [negatively] affect the rights or obligations of any person that is not a party to the agreement.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 should rather refer to a negative effect or modification of third-party rights, as an agreement may have an indirect effect on or benefit to third-party rights (e.g. a subordination agreement).*]

Article 5. General standards of conduct

1. A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.

2. The general standards of conduct set forth in paragraph 1 cannot be waived unilaterally or varied by agreement.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 is necessary given that article 4 already states that the rule embodied in this article cannot be waived unilaterally or varied by agreement. The Working Group may wish to note that the Guide to Enactment will explain that: (a) the concept of "commercial reasonableness" refers to the commercial context and best practices; and (b) meeting the specific standards referred to in other articles of this Law would generally be construed as meeting the general standards of conduct referred to in this article (see A/CN.9/830, paras. 31-33).*]

Chapter II. Creation of a security right

A. General rules

Article 6. Security agreement

1. A security right is created by a security agreement that satisfies the requirements of paragraphs 2 to 5, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.

2. A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it.

3. A security agreement must:

(a) Provide for the creation of a security right;

(b) Identify the secured creditor and the grantor;

(c) Describe the secured obligation;

(d) Describe the encumbered assets as provided in article 9 [; and

(e) Indicate the maximum monetary amount for which the security right may be enforced].[3]

4. Except as provided in paragraph 5, a security agreement must be [the enacting State should specify whether the security agreement must be "concluded in" or "evidenced by" a writing] that satisfies the requirements of paragraph 3 and is signed by the grantor.

5. A security agreement may be oral if the secured creditor has possession [or control] of the encumbered asset.

[*Note to the Working Group: The Working Group may wish to consider whether the requirements set out in paragraph 2 apply only to situations in which a written security agreement is required (i.e. they do not apply to possessory security rights where an oral security agreement is permitted). In this regard, the Working Group may wish to note that, in the case of oral security agreements: (a) requirements (a)-(c) are already covered by paragraph 1 of this article insofar as it refers to the creation of a "security right" and requires a "security agreement", as defined in the draft Model Law; and (b) requirements (d) and (e) by their very nature are inapplicable to the situation where an oral security agreement is permitted because, where there is possession: (i) there is no need for a description that identifies the encumbered asset adequately since the very fact of possession satisfies the description requirement; and (ii) the requirement to agree to a maximum amount to be secured is inapplicable since this requirement is practically capable of being satisfied only if there is a written agreement. If the Working Group decides to delete paragraph 2, paragraph 3 should be revised to read along the following lines: "... a writing that: (a) identifies the secured creditor*

[3] The enacting State may wish to include this subparagraph in the draft Model Law if it determines that an indication of the maximum monetary amount for which the security right may be enforced would be helpful to facilitate lending from another creditor.

and the grantor, (b) Describes the secured obligation, (c) Describes the encumbered assets as provided in article 9, (d) Is signed by the grantor[, and (e) Indicates the maximum monetary amount for which the security right may be enforced". The Working Group may wish to note that the Guide to Enactment will explain that the enacting State may wish to select in paragraph 4 one of the two alterative wordings that are set out within square brackets. The Working Group may wish to consider the bracketed text in paragraph 5, which would dispense with the need for a written security agreement if the secured creditor has control with respect to a bank account or non-intermediated security.]

Article 7. Obligations that may be secured

A security right may secure any type of obligation, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating.

Article 8. Assets that may be encumbered

A security right may encumber:

(a) Any type of movable asset, including future assets;

(b) Parts of assets and undivided rights in movable assets;

(c) Generic categories of movable assets; and

(d) All of a grantor's movable assets.

[Article 9. Required description of assets

1. [For the purpose of satisfying the requirements for a [written] security agreement referred to in article 6, paragraph 3, the] [The] assets to be encumbered must be described in the security agreement in a manner that reasonably allows their identification.

2. A generic description that refers to all assets within a category of assets or to all of the grantor's assets meets the standard referred to in paragraph 1.]

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in paragraph 1, which is intended to limit the application of this article to written agreements. The Working Group may also wish to note that, in view of their importance, the requirements for the description of encumbered assets have been moved from article 6, subparagraph 3(d) to this new article.*]

Article 10. Proceeds

1. A security right in an asset extends to its identifiable proceeds.

2. Notwithstanding paragraph 1, where proceeds in the form of funds credited to a bank account or money are commingled with other assets of the same kind the security right extends to the commingled assets.

3. Subject to paragraph 4, the obligation secured by a security right that continues in commingled assets in accordance with paragraph 2 is limited to the value of the proceeds immediately before they were commingled.

4. If at any time after the commingling, the value of the balance credited to the bank account or of the commingled money is less than the value of the proceeds immediately before they were commingled, the obligation secured by the security right that continues in the commingled assets in accordance with paragraph 2 is limited to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, if new proceeds are deposited after the account or pool of money is depleted below the value of the proceeds originally deposited or contributed, then one would need to reapply these same rules to these later proceeds (i.e. the amount of each proceeds claim must be assessed separately).*]

Article 11. Assets commingled in a mass or product

1. A security right in a tangible asset that is commingled in a mass or product extends to the mass or product.

2. The obligation secured by a security right that continues in a mass or product in accordance with paragraph 1 is limited to the value of the encumbered asset immediately before it became part of the mass or product.

[3. Where more than one security right continues in the same mass or product in accordance with paragraph 1 and each was a security right in a separate tangible asset at the time of commingling, the secured creditors are entitled to share in the mass or product according to the ratio that the obligation secured by each security right bears to the sum of the obligations secured by all security rights.]

[*Note to the Working Group: The Working Group may wish to note that paragraph 3 has been added to more closely align this article with recommendations 22 and 91 of the* Secured Transactions Guide.]

B. Asset-specific rules

Article 12. Contractual limitations on the creation of a security right

1. A security right in a receivable or other intangible asset, negotiable instrument or right to payment of funds credited to a bank account is effective as between the grantor and the secured creditor and as against the debtor of the receivable or other intangible asset, the obligor under a negotiable instrument, or the depositary bank notwithstanding an agreement limiting in any way the grantor's right to create a security right entered into between the initial or any subsequent grantor and:

(a) The debtor of the receivable or other intangible asset, the obligor under the negotiable instrument or the depositary bank; or

(b) Any subsequent secured creditor.

2. Nothing in this article affects any obligation or liability of the grantor for breach of the agreement referred to in paragraph 1, but the other party to the agreement may not avoid the contract giving rise to [the receivable or other intangible asset, negotiable instrument or right to payment of funds credited to a bank account] [the encumbered asset] or the security agreement on the sole ground

of the breach of that agreement], or raise against the secured creditor any claim it may have as a result of such a breach against the grantor, as provided in article 72, paragraph 2].

3. A person that is not a party to the agreement referred to in paragraph 1 is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.

4. This article applies only to receivables:

(a) Arising from a contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;

(b) Arising from a contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Arising upon [net settlement of payments due pursuant to a netting agreement involving more than two parties] [the termination of all outstanding transactions].

[*Note to the Working Group: The Working Group may wish to note that this article, which is based on recommendation 24 of the* Secured Transactions Guide, *which in turn is based on article 9 of the* United Nations Convention on the Assignment of Receivables in International Trade *(the "*United Nations Assignment Convention*"), has been revised to address contractual limitations on the creation of a security right in assets in addition to receivables, namely other intangible assets, negotiable instruments and rights to payment of funds credited to a bank account (see A/CN.9/830, paras. 59-63). The Working Group may wish to consider the two sets of bracketed wording in paragraph 4(d) (the first set is based on rec. 24, subpara. (f)(iv) of the* Secured Transactions Guide *and while the second set is based on art. 1, subpara. 3(d) of the draft Model Law).*]

Article 13. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

Alternative A

1. A secured creditor with a security right in a receivable or other intangible asset, or a negotiable instrument has the benefit of any personal or property right that secures or supports payment or other performance of the encumbered asset without any further action by either the grantor or the secured creditor.

2. If the right referred to in paragraph 1 is an independent undertaking, the security right automatically extends to the right to receive the proceeds of, but not the right to draw under, the independent undertaking.

Alternative B

1. A security right in a receivable or other intangible asset, or a negotiable instrument extends to any personal or property right that secures or supports

payment or other performance of the encumbered asset that is transferable without a new act of transfer.

2. If the right referred to in paragraph 1 of this article is transferable only with a new act of transfer, the grantor is obliged to create a security right in it in favour of the secured creditor.

[3. This article does not affect a right in immovable property that under other law is transferable separately from the obligation that the right in the immovable property secures.]

4. Paragraph 1 does not affect any duties of the grantor to the debtor of the receivable or other intangible asset, or the obligor of the negotiable instrument.

5. To the extent that the automatic effects of paragraph 1 are not impaired, this article does not affect any requirement under other law relating to the form or registration of the creation of a security right in any asset that is not covered in this Law.

[*Note to the Working Group: The Working Group may wish to consider alternatives A and B of paragraphs 1 and 2 of this article. Alternative A reflects the thrust of recommendation 25 of the* Secured Transactions Guide, *while alternative B reflects the thrust of article 10 of the* Assignment Convention *(rather than rec. 25). Under alternative B, the security right extends automatically to accessory security or supporting rights, while with respect to independent rights, the grantor is obliged to create a security right in them in favour of the secured creditor. Thus, there is no inconsistency with article 1, subparagraph 3(a), and there is no need to also include the full text of recommendation 127 of the* Secured Transactions Guide *to protect the rights of a guarantor/issuer, confirmer or nominated person of an independent undertaking. If alternative A were preferred, the Working Group may wish to consider whether the thrust of recommendation 127 (which has not been included in the draft Model Law as it does not apply to the right to receive the proceeds under an independent undertaking), should also be included in this article to avoid any adverse impact on the rights of a guarantor/issuer, confirmer or nominated person of an independent undertaking. The Working Group may wish to consider whether paragraph 4 should be retained in view of the fact that articles 70, 77 and 78 have been included in the draft Model Law so as to ensure that the rights of the debtor of an encumbered receivable and the obligor of an encumbered negotiable instrument under other law are protected. In this connection, the Working Group may wish to note that there is no provision equivalent to articles 70, 77 and 78 to preserve the rights of an obligor of an intangible asset other than a receivable.*]

Article 14. Negotiable documents and tangible assets covered

A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer of the negotiable document is in possession of the asset[, directly or indirectly,] at the time the security right in the document is created.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that in view of the definition of the term "possession" in article 2, possession of the issuer includes possession by its representative or a person acting on behalf of the issuer. The Working Group may*

wish to consider whether the bracketed wording, which comes from recommendation 28 of the Secured Transactions Guide, *should be retained. The Guide to Enactment will also explain that a security right in a negotiable document extends to the tangible assets covered by the document and will continue to exist even after the document no longer covers the assets. However, effectiveness against third parties through possession of the document applies only as long as the document covers the assets, but not once they are released by the issuer (see art. 24, para. 2, below).*]

Article 15. Tangible assets with respect to which intellectual property is used

A security right in a tangible asset with respect to which intellectual property is used does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 16. General methods for achieving third-party effectiveness

A security right in an asset is effective against third parties if:

(a) A notice with respect to the security right is registered in the general security rights registry (the "Registry") [or in any specialized registry or title certificate to be specified by the enacting State][4]; or

(b) The secured creditor has possession of that asset.

Article 17. Proceeds

1. If a security right in an asset is effective against third parties, a security right in any proceeds of that asset is effective against third parties without any further action by the grantor or the secured creditor if the proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

2. If a security right in an asset is effective against third parties, a security right in any type of proceeds of that asset other than the types of proceeds referred to in paragraph 1 is effective against third parties:

(a) For [a short period of time to be specified by the enacting State] days after the proceeds arise; and

(b) Thereafter, if the security right in the proceeds is made effective against third parties by one of the methods applicable to the relevant type of encumbered asset referred to in this chapter before the expiry of the time period provided in subparagraph (a).

[4] An enacting State may wish to implement this provision if it has a specialized registration system.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, unlike recommendation 39 of the* Secured Transactions Guide, *paragraph 1 does not refer to the description of the proceeds in the notice as, once the proceeds are described in the notice (in line with the security agreement), they constitute original encumbered assets, not proceeds, and article 16 was sufficient in dealing with the third-party effectiveness of a security right in those assets.*]

Article 18. Changes in the method for achieving third-party effectiveness

1. A security right made effective against third parties by one of the methods provided in this chapter may subsequently be made effective against third parties by any other method applicable to the relevant type of encumbered asset.

2. A security right that is effective against third parties remains effective against third parties despite a change in the method for achieving third-party effectiveness, provided that there is no time when the security right is not effective against third parties.

Article 19. Lapse in third-party effectiveness

1. If third-party effectiveness of a security right lapses, it may be re-established by any of the methods applicable to the relevant encumbered asset provided in this chapter.

2. If the third-party effectiveness of security right is re-established under paragraph 1, the security right is effective against third parties only as of the time its third-party effectiveness is re-established.

Article 20. Impact of a transfer of an encumbered asset

Except as provided in article 37, a security right in an asset remains effective against third parties even if the asset is sold or otherwise transferred, leased or licensed.

[*Note to the Working Group: The Working Group may wish to consider whether the rule that a security right follows an encumbered asset in the hands of a transferee fits more in the chapter on third-party effectiveness (impact on registration; see art. 37) and in the chapter on priority (authorization of the transfer by the secured creditor or transfer in the ordinary course of business of the transferor; see art. 42, paras. 2 to 8).*]

Article 21. Change of the applicable law to this Law

1. If a security right is effective against third parties under the law of another State and this Law becomes applicable, the security right remains effective against third parties under this Law for [a short period of time to be specified by the enacting State] days after the change and, thereafter, only if the third-party effectiveness requirements of this Law are satisfied before the expiry of that time period.

2. If the security right remains effective against third parties under paragraph 1, the time of third-party effectiveness is the time when it was achieved under the law of the other State.

Article 22. Acquisition security rights in consumer goods

An acquisition security right in consumer goods is effective against third parties upon its creation without any further action by the grantor or the secured creditor.

B. Asset-specific rules

Article 23. Rights to payment of funds credited to a bank account

A security right in a right to payment of funds credited to a bank account may also be made effective against third parties by:

(a) The security right being created in favour of the depositary bank;

(b) Conclusion of a control agreement; or

(c) The secured creditor becoming the account holder.

Article 24. Negotiable documents and tangible assets covered

1. If a security right in a negotiable document is effective against third parties, the security right that extends to the asset covered by the document in accordance with article 14 is also effective against third parties.

2. During the period when a negotiable document covers an asset, a security right in the asset may be made effective against third parties by the secured creditor's possession of the document.

3. A security right in a negotiable document that was made effective against third parties by the secured creditor's possession of the document remains effective against third parties for [a short period of time to be specified by the enacting State] after the negotiable document has been relinquished to the grantor or other person for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the assets covered by the negotiable document.

Article 25. Non-intermediated securities

A security right in uncertificated non-intermediated securities may also be made effective against third parties by:

(a) Notation of the security right or entry of the name of the secured creditor as the holder of the securities in the books maintained for that purpose by or on behalf of the issuer; or

(b) Conclusion of a control agreement.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that States parties to the* Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes *(Geneva, 1930; the* "Geneva Uniform Law"*) may wish to include in the asset-specific section of the creation or third-party effectiveness chapter a provision that a security right may be created and made effective against third parties by delivery and endorsement containing the statement "value in security" ("valeur en garantie"), "value in pledge" ("valeur en gage"), or any other statement implying a security right (see*

art. 19, art. 22 of the United Nations Convention on International Bills of Exchange and International Promissory Notes, *the* "Bills and Notes Convention" *contains a similar rule). An enacting State that decides to do so will have to adjust article 60 of the draft Model Law to deal with the comparative priority of such a security right.*]

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Addendum

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Chapter IV. Registration of a notice with respect to a security right

A. General rules

Article 26. Establishment of the general security rights registry

The Registry [is] [will be] established [the enacting State to specify whether the Registry is established by this Law or will be established later through a regulation or another law, which will enact the provisions of the Annex to this Law] for the purpose of receiving, storing and making accessible to the public information in registered notices with respect to security rights in accordance with this Law and [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law].

[*Note to the Working Group: The Working Group may wish to note that this article has been revised to be aligned with recommendation 1 of the* Registry Guide. *The Working Group may also recall that at its twenty-fifth session it decided to separate legal registration rules that were retained in this chapter and technical registration issues that were moved to the annex of the draft Model Law (see A/CN.9/802, paras. 12-14). This approach is based on the assumption that depending on its legislative policy and drafting technique, each enacting State may implement the registration-related rules partly in the secured transactions law and partly in administrative rules (a Regulation), or in a separate law (see* Registry Guide, *subpara. 9(m)). However, the result may be more difficult for enacting States to understand and implement. For example, it may not be easy for an enacting State to understand why there is no article in the draft Model Law on the rejection of a registration which is a fundamental issue or the authorization to by the grantor to a third party to request information about a registration. The Working Group may also wish to consider which of the definitions of the* Registry Guide *may need to be added to article 2. The Working Group may also wish to note that that some modern secured transactions laws provide for the registration of notices other than those relating to security right (e.g. enforcement notices and notices of preferential claims) and consider whether registration of such notices should be foreseen in the draft Model Law or at least discussed in the Guide to Enactment (see* Registry Guide, *paras. 51 and 52).*]

Article 27. Public access to registry services

1. The security rights registry must be open to the public in accordance with paragraph 2 and [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law].

2. Any person may submit a notice or a search request to the Registry in accordance with the provisions of this Law and [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law].

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 54, subparagraphs (c) and (f) of the* Secured Transactions Guide *and 4 of the* Registry Guide. *The Working Group may also wish to note that the Guide to Enactment will clarify that, in line*

with recommendation 54, subparagraph (j) of the Secured Transactions Guide *and recommendation 5 of the* Registry Guide, *the Registry should be electronic, if possible (which means that it may be hybrid or paper), and consider whether the draft Model Law should be drafted to accommodate all types of registry.*]

Article 28. Grantor's authorization for registration

1. Registration of an initial notice is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the grantor in writing, before or after registration.

2. Registration of an amendment notice is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the grantor in writing, before or after registration, if the amendment notice:

(a) Contains a description of [additional] encumbered assets [not included in the security agreement or other authorization of the grantor];

(b) Contains the identifier(s) and addresses of one or more than one [additional] grantor [not included in the security agreement or other authorization of the grantor]; [or]

[(c) Increases the maximum amount for which the security right to which the registration relates may be enforced;] [or]

[(d) [The enacting State to specify any additional amendment notices that require authorization by the grantor in writing]].

3. Except as provided in paragraph 4, registration of an amendment notice that contains the identifier and address to one or more than one additional grantor is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the additional grantor in writing.

4. [Notwithstanding paragraph 3, no] [No] authorization by the additional grantor is required if the additional grantor is a transferee of an encumbered asset described in a previously registered notice to which the amendment notice relates.

5. A security agreement [that meets the requirements of article 6], or a written agreement that amends the security agreement, is sufficient to constitute authorization by the grantor for the registration of an initial or amendment notice covering the assets described therein.

6. Evidence of the existence of the authorization of the grantor is not required for the Registrar to accept the registration of an initial or amendment notice.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 71 of the* Secured Transactions Guide *and 7, subparagraph (b) of the* Registry Guide. *The Working Group may also wish to consider the alternatives included within square brackets in paragraphs 1 and 2 ("is ineffective unless" or is "effective if"; see also article 38 below) and in subparagraph 2(a). The second set of bracketed words in subparagraph 2(a) is intended to clarify that, if the secured creditor forgets to set out in the initial notice*

some assets included in the security agreement or other authorization of the grantor and then realizes this error, the amendment notice does not "contain a description of additional assets" and would not require the grantor's separate authorization. The Working Group may wish to note that in paragraph 6 reference is made to the "registrar" rather than to the "registry", as the latter term is defined as a system and not as a person (the term "registrar" may need to be defined to include the registry staff). The Working Group may also wish to note that the Guide to Enactment will explain that registration of an amendment notice that adds encumbered assets or increases the maximum amount may affect intervening secured creditors, and therefore takes effect only when the registration of the amendment notice (not the initial notice) becomes effective (see article 31, para. 1 below). The Guide to Enactment will also explain that there is no need to register an amendment notice or obtain the authorization of the grantor with respect to "additional assets" that: (a) are the proceeds of encumbered assets described in a previously registered notice, as the security right extends to proceeds by law (see art. 10, para. 1); and (b) are cash proceeds (money, receivables, negotiable instruments or funds credited to a bank account) (see art. 17, para. 1).]

Article 29. A notice may relate to more than one security right

A single notice may relate to one or more than one security right created by the grantor in favour of the same secured creditor whether they arise under one or more than one security agreement between the same parties.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 68 of the* Secured Transactions Guide *and 14 of the* Registry Guide.]

Article 30. Time when a notice may be registered

An initial or amendment notice may be registered at any time, including before the conclusion of the security agreement, to which the notice relates, or, in the case of a future asset, before the grantor acquires rights in the asset or the power to encumber it, provided that registration is authorized by the grantor in accordance with article 28.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 67 of the* Secured Transactions Guide *and recommendation 13 of the* Registry Guide.]

Article 31. Time of effectiveness of a registered notice

1. The registration of an initial or amendment notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

[2. The date and time when the information in an initial or amendment notice is entered into the registry record so as to be accessible to searchers is indicated in the public registry record.]

[3. Information in an initial or amendment notice is entered into the registry record as soon as practicable after the notice is submitted and in the order in which it was submitted.]

4. The registration of a cancellation notice is effective from the date and time when the information in any previously registered notice to which it relates is no longer accessible to searchers of the public registry record.

[5. The date and time when the information in any initial or amendment notice to which a cancellation notice relates is no longer accessible to searchers is indicated in the registry record.]

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 70 of the* Secured Transactions Guide *and 11 of the* Registry Guide. *The Working Group may also wish to consider whether paragraphs 2, 3 and 5 of this article that appear within square brackets should be deleted and matters addressed therein should be addressed in the Annex to the draft Model Law.*]

Article 32. Period of effectiveness of a registered notice

Option A

1. A registered notice is effective for [a period of time, such as five years, to be specified by the enacting State].

2. The period of effectiveness of a registered notice may be extended by the registration of an amendment notice indicating this intent in the designated field within [a period of time, such as six months, to be specified by the enacting State] before its expiry.

3. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for [the period of time specified in paragraph 1] beginning from the time the current period would have expired if the amendment notice had not been registered.

Option B

1. A registered notice is effective for the period of time indicated by the registrant in the designated field of the notice.

2. The period of effectiveness of a registered notice may be extended at any time before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness.

3. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period of time indicated in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

Option C

1. A registered notice is effective for the period of time indicated by the registrant in the designated field of the notice, not exceeding [a maximum period of time, such as 20 years, to be specified by the enacting State].

2. The period of effectiveness of a registered notice may be extended within [a period of time, such as six months, to be specified by the enacting State] before its expiry by the registration of an amendment notice that indicates in the designated

field a new period of effectiveness not exceeding [the maximum period of time specified in paragraph 1].

3. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period of time specified in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 69 of the* Secured Transactions Guide *and 12 of the* Registry Guide. *The Working Group may also wish to note that the Guide to Enactment will explain that the period of effectiveness can be indicated by a reference to a number of years or an expiry date, as specified by the Registry.*]

Article 33. Organization of information in registered notices

The registry record is organized so that the information in a registered initial and in any associated registered notice can be retrieved by a search of the registry record that uses the identifier of the grantor or the registration number assigned to the initial notice as the search criterion.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 16 of the* Registry Guide.]

Article 34. Information required in an initial notice

An initial notice must contain the following items of information in the designated field for each item:

(a) The identifier and address of the grantor [and any additional grantor information that the enacting State may decide to permit or require to be entered to assist in uniquely identifying the grantor];

(b) The identifier and address of the secured creditor or its representative; [and]

(c) A description of the encumbered asset in accordance with article 9;

[(d) The period of effectiveness of the registration];[1] and

[(e) A statement of the maximum amount for which the security right to which the registered notice relates may be enforced.][2]

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 57 of the* Secured Transactions Guide *and 23 of the* Registry Guide. *The Working Group may also wish to consider whether articles 12-14 of the Annex should be moved to a new article that would elaborate on the items set out in article 34. The Working Group may also wish to note that many modern registries provide for serial number registration of serial number assets and consider whether serial number registration should be addressed in the draft Model Law or discussed only in the Guide to Enactment*

[1] This provision will be necessary, if the enacting State implements option B or C of article 32.

[2] This provision will be necessary if the enacting State includes in its law article 6, subparagraph 3(e) of the draft Model Law.

(see Secured Transactions Guide, *chap. IV, paras. 34-36 and* Registry Guide, *paras. 131-134). The Working Group may also wish to note that the Guide to Enactment will discuss the possibility of using unique numbers as grantor identifiers and of the Registry being connected to an identity-number database to ensure that the name and identity number entered match. This procedure could work for both types of grantors, individuals and entities, or only for one type depending on the availability of identity numbers. In such systems, a registration will not be processed if the two do not match (this would be the only exclusion to the general rule that the registry does not verify the veracity of the information). With respect to subparagraph (e), the Guide to Enactment will refer to the discussion in the* Registry Guide *(see paras. 200-204).*]

Article 35. Impact of a change of the grantor's identifier

1. If the grantor's identifier changes after a notice is registered and the secured creditor registers an amendment notice adding the new identifier of the grantor within [a short period of time, such as 30 days, to be specified by the enacting State] after the change, the security right to which the notice relates remains effective against third parties and retains its priority.

2. If the grantor's identifier changes after a notice is registered and the secured creditor registers an amendment notice adding the new identifier of the grantor after the expiration of the time period indicated in paragraph 1:

(a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the change in the grantor's identifier but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after the change in the grantor's identifier but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 61 of the* Secured Transactions Guide. *The Working Group may also wish to note that the Guide to Enactment will explain that: (a) if the secured creditor registers the amendment notice during the "grace period" contemplated in paragraph 1 of this article, the third-party effectiveness and priority of its security right is preserved as against the categories of competing claimants described in this article even if they acquired their rights prior to the registration of the amendment notice; (b) while a secured creditor's failure to register an amendment notice adding the grantor's new identifier has the negative priority consequences against the categories of competing claimants described in this article, it does not prejudice the third-party effectiveness or priority of its security right as against other categories of competing claimants such as the grantor's insolvency representative; (c) while the "grace period" begins to run from the time of the name change regardless of whether or not the secured creditor actually knew about the name, later registration of a security right amendment notice change after the expiry of that grace period will still protect the secured creditor as against the categories of competing claimants described in this article if their rights arise after the registration; and (d) an amendment notice must be*

registered for the purposes of the rules stated in this article only if the name change would make the registration irretrievable by a searcher using the new name of the grantor as the search criterion. The Working Group may wish to consider whether all those issues should be addressed explicitly in this chapter and/or the priority chapter.]

Article 36. Impact of errors in required information

1. An incorrect statement of the grantor identifier in a notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion.

2. An incorrect or insufficient statement of the information required in a notice other than the grantor's identifier does not render the registration ineffective unless the error would seriously mislead a reasonable searcher.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 64-66 of the* Secured Transactions Guide *and 29 of the* Registry Guide.]

Article 37. Impact of a transfer of an encumbered asset

Option A

1. If an encumbered asset covered by a registered notice is transferred after the notice is registered and the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor within [a short period of time, such as 30 days, to be specified by the enacting State] after the transfer, the security right to which the initial notice relates remains effective against third parties and retains its priority.

2. If the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor after the expiration of the time period indicated in paragraph 1:

(a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

Option B

1. If an encumbered asset covered by a registered notice is transferred after the notice is registered and the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor within [a short period of time, such as 30 days, to be specified by the enacting State] after the transfer, the security right to which the initial notice relates remains effective against third parties and retains its priority.

2. If the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor after expiration of the time period indicated

in paragraph 1, starting when the secured creditor acquires knowledge about the transfer of the encumbered asset:

(a) A security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

Option C

A security right to which the notice relates remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered asset covered by the registered notice.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 62 and paragraphs 78-80 of chapter IV of the* Secured Transactions Guide. *The Working Group may wish to consider making a decision as to which of the options in this article is preferable, rather than leaving the matter to each enacting State. The Working Group may also wish to consider whether it should be clarified in this article or in the Guide to Enactment that this article does not apply to outright transfers of receivables. Outright transfers of receivables fall within the scope of the Law and the transferee must register in order to make its right effective against third parties in the same way as a secured creditor that acquires a security right in receivables. The Working Group may also wish to note that the Guide to Enactment will clarify that, if a State adopts option C, it will not need to implement article 40, which includes the same rule with respect to transfers of intellectual property. The Guide to Enactment will also clarify that, in accordance with article 34, subparagraph (a), the identifier and the address of the transferee should be entered in the appropriate fields of the notice.*]

Article 38. Secured creditor's authorization

1. The person named in the initial notice as the secured creditor may register an amendment or cancellation notice relating to that initial notice at any time.

Option A

2. The registration of an amendment or cancellation notice is effective [if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law]] regardless of whether it is authorized by the person named in the initial notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

Option B

2. The registration of an amendment or cancellation notice is effective [if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law]] regardless of whether it

is authorized by the person named in the initial notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

3. The registration of an amendment or cancellation notice which is not authorized by the person named in the initial notice as the secured creditor does not affect the priority of the security right to which it relates as against the right of a competing claimant over which the security right had priority before the registration of the amendment or cancellation notice.

Option C

2. The registration of an amendment or cancellation notice is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the person named in the initial notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

Option D

2. The registration of an amendment or cancellation notice is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the person named in the initial notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

3. The registration of an amendment or cancellation notice which is not authorized by the person named in the initial notice as the secured creditor does not affect the priority of the security right to which it relates as against the right of a competing claimant which would have priority if the registration were treated as effective and which was acquired in reliance on a search of the registry record made after the registration of the amendment or cancellation notice, provided the competing claimant did not have knowledge that the registration of the notice was unauthorized at the time it acquired its right.

[*Note to the Working Group: The Working Group may wish to note that the matter addressed in this article was not dealt with in the* Secured Transactions Guide *but it was discussed in the* Registry Guide *(paras. 258-268). The Working Group may also wish to consider whether options C and D of this article are compatible with the* Secured Transactions Guide *(rec. 74) and the* Registry Guide *(rec. 20), according to which upon registration of a cancellation notice, information contained in a registered notice is to be removed from the public registry record and archived. The Working Group may wish to consider whether the text of this article is to cover the situation where the secured creditor named in the initial notice assigned its rights. Presumably, an amendment notice will be registered naming the assignee as the secured creditor and any subsequent amendment or cancellation notice would require the authorization of the secured creditor named in that amendment notice. The Working Group may also wish to consider whether the Guide to Enactment should clarify that the choice of a rule (option) would depend on the design of the registry system. For example, in*

a two-level security registry system where the user obtains a password protected account and gets a special code to register an amendment or cancellation, option A may be appropriate. The Working Group may also wish to consider whether the draft Model Law or the Guide to Enactment should identify the court or other authority that has jurisdiction for all issues arising under the draft Model Law.]

Article 39. Compulsory registration of an amendment or cancellation notice

1. [As soon as practicable, the] [The] secured creditor must register an amendment or cancellation notice, as the case may be, if:

(a) The registration of an initial or amendment notice has not been authorized by the grantor at all or the notice contains information that exceeds the scope of the grantor's authorization;

(b) The registration of an initial or amendment notice has been authorized by the grantor but the authorization has been withdrawn and no security agreement has been concluded;

(c) The security agreement to which the registered notice relates has been revised in a way that makes some or all of the information contained in the notice incorrect or insufficient and the grantor has not otherwise authorized the registration; or

(d) The security right to which the notice relates has been extinguished by full payment or other performance of the secured obligation, or otherwise and there is no further commitment by the secured creditor to extend credit secured by the encumbered assets to which the notice relates.

[2. If any of the conditions set out in paragraph 1 are met, the grantor is entitled to request the secured creditor in writing that the secured creditor register an amendment or cancellation notice.]

3. [If the secured creditor does not comply with the grantor's written request provided in paragraph 2 within [a short period of time, such as 15 days, to be specified by the enacting State] after receipt of the grantor's request, the] [The] grantor is entitled to seek the registration of an amendment or cancellation notice, as the case may be, through [a summary judicial or administrative procedure to be specified by the enacting State].

4. The grantor is entitled to seek the registration of an amendment or cancellation notice, as the case may be, in accordance with the procedure referred to in paragraph 3 even before the expiry of the time period specified therein, provided that [the enacting State should introduce appropriate measures to protect the secured creditor].

5. An amendment or cancellation notice, as the case may be, ordered to be registered in accordance with the procedure referred to in paragraph 3 is registered by

Option A

The registrar as soon as practicable after the notice is submitted to the registry for registration with a copy of [the relevant judicial or administrative order to be specified by the enacting State] attached.

Option B

[The judicial or administrative officer to be specified by the enacting State] who ordered the notice to be registered as soon as practicable after the issuance of [the relevant judicial or administrative order to be specified by the enacting State] with a copy thereof attached.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 72 of the* Secured Transactions Guide *and 33 of the* Registry Guide. *The Working Group may wish to consider the bracketed text in paragraph 1 and paragraph 2. The Working Group may also wish to consider whether the provisions of this chapter or the Guide to Enactment should clarify which secured creditor is meant in this chapter, the secured creditor identified in a registered notice or the actual secured creditor (e.g. a transferee of a receivable that has not registered a notice with respect the transfer).*]

B. Asset-specific rules

Article 40. Impact of a transfer of encumbered intellectual property on the effectiveness of the registration

A security right in intellectual property to which the notice relates remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered intellectual property covered by the registered notice.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, while this article is based on recommendation 244 of the* Intellectual Property Supplement, *its formulation has been aligned with the formulation of option C of article 37 of the draft Model Law. The Guide to Enactment will also explain that, if a State adopts option C of article 37, it will not need to implement this article. Finally, the Guide to Enactment will explain that this article does not address the question whether the transferee acquires the encumbered intellectual property free or subject to the security right (which is addressed in art. 43).*]

Chapter V. Priority of a security right

A. General rules

Article 41. Competing security rights

1. Subject to articles 42-51, priority among competing security rights created by the same grantor in the same encumbered asset is determined according to the order of third-party effectiveness.

[2. Priority among competing security rights created by the different grantors in the same encumbered asset is determined according to the order of third-party effectiveness[, provided that, upon transfer of the encumbered asset, the secured creditor of each grantor complies with the requirements of article 37, option A or B, to preserve the third-party effectiveness and priority of its security right].]

[3]. The priority of a security right is not affected by a change in the method by which it is made effective against third parties, provided that there is no time period during which the security right is not effective against third parties.

[4.] The priority of a security right in the proceeds of an encumbered asset is the same as the priority of the security right in that asset.

[5.] If two or more security rights in the same tangible asset continue in a mass or product as provided in article 11, they retain the same priority as the security rights in the asset had as against each other immediately before the asset became part of the mass or product.

[6.] If security rights in separate tangible assets continue in the same mass or product and each security right is effective against third parties, the secured creditors are entitled to share in the aggregate maximum value of their security rights in the mass or product according to the ratio of the value of the respective security rights.

[7.] For purposes of paragraph [6], the maximum value of a security right is the lesser of the value determined in accordance with article 11 and the amount of the secured obligation.

[8.] An acquisition security right in a separate tangible asset that continues in a mass or product and is effective against third parties has priority as against a security right granted by the same grantor in the mass or product.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that paragraph 1 of this article reflects in general terms recommendation 76 of the* Secured Transactions Guide, *and refers to third-party effectiveness (which requires creation and a third-party effectiveness act), while advance registration (i.e. before the creation of the security right or conclusion of the security agreement and thus before third-party effectiveness is achieved) is addressed in article 51. The Working Group may wish to consider paragraph 2, which has been added within square brackets to deal with priority conflicts among security rights granted by the different grantors (i.e. the grantor and successive transferees of the same encumbered asset). The Working Group may also wish to note that the Guide to Enactment will explain that paragraph 1 deals with conflicts of priority: (a) among security rights that were made effective against third parties by registration (in the security rights registry); (b) among security rights that were made effective against third parties otherwise than by registration (in the security rights registry); and (c) among security rights that were made effective against third parties by registration (in the security rights registry) and security rights that were made effective against third parties otherwise than by registration (in the security rights registry). The Working Group may wish to note that paragraph 2 of this article may need to be coordinated with articles 18 and 19 (see A/CN.9/WG.VI/WP.63). The Working Group may also wish to note that paragraph 4 has been revised to deal with the priority of a security right in the proceeds of an encumbered asset, rather than with the time of third-party effectiveness as recommendation 100 of the* Secured Transactions Guide *on which it was originally based. The Guide to Enactment will explain that article 10 is sufficient to provide that a security right in an encumbered asset extends to its identifiable proceeds and article 17 is sufficient to provide that, once the security right in an asset is effective against third-parties, the security right in its*

proceeds is effective against third parties as of the same time without any further action.]

Article 42. Rights of buyers or other transferees, lessees or licensees of an encumbered asset

1. If an encumbered asset is sold or otherwise transferred, leased or licensed and a security right in that asset is effective against third parties at the time of the sale or other transfer, lease or licence, a buyer or other transferee, lessee or licensee acquires its rights subject to the security right except as provided in this article.

2. A buyer or other transferee of an encumbered asset acquires its rights free of the security right, if the secured creditor authorizes a sale or other transfer of the asset free of the security right.

3. The rights of a lessee or licensee of an encumbered asset are not affected by a security right if the secured creditor authorizes the grantor to lease or license the asset unaffected by the security right.

4. A buyer of a tangible encumbered asset sold in the ordinary course of the seller's business acquires its rights free of the security right, provided that, at the time of the conclusion of the sale agreement, the buyer does not have knowledge that the sale violates the rights of the secured creditor under the security agreement.

5. The rights of a lessee of a tangible encumbered asset leased in the ordinary course of the lessor's business are not affected by the security right, provided that, at the time of the conclusion of the lease agreement, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.

6. Subject to the rights of a secured creditor with a security right in intellectual property in accordance with article 59, the rights of a non-exclusive licensee of an intangible encumbered asset licensed in the ordinary course of the licensor's business are not affected by the security right, provided that, at the time of the conclusion of the licence agreement, the licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement.

7. If a buyer or other transferee of a tangible encumbered asset acquires its rights free of a security right, any subsequent buyer or other transferee also acquires its rights free of that security right.

8. If the rights of a lessee of a tangible encumbered asset or licensee of an intangible encumbered asset are not affected by the security right, the rights of any sub-lessee or sub-licensee are also unaffected by that security right.

[*Note to the Working Group: The Working Group may wish to consider that the fact that exceptions to the rule in paragraph 1 of this article apply only to buyers or other transferees, lessees or licensees for value, and not to donees or other gratuitous transferees, is sufficiently clear or should be explicitly clarified in this article or in the Guide to Enactment (see* Secured Transactions Guide, *chap. V, para. 89).*]

Article 43. Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration[1]

1. A security right in an asset that is made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any] has priority over a security right in the same asset which is made effective against third parties by any other method, regardless of the order of registration.

2. If an encumbered asset is sold or otherwise transferred, leased or licensed and, at the time of the sale or other transfer, lease or licence, a security right in that asset is effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any], the buyer or other transferee, lessee or licensee acquires its rights subject to the security right, except as provided in paragraphs 2-8 of article 42.

3. If a security right in an asset that may be made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any], has not been made effective against third parties by such registration, a buyer or other transferee acquires its rights free of the security right and a lessee's or licensee's rights are unaffected by the security right.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that recommendation 77, subparagraph (b) of the* Secured Transactions Guide *is not reflected in this article as the priority of rights registered in a specialized registry is a matter for the relevant specialized registration law.*]

Article 44. Rights of the insolvency representative

[1.] A security right that is effective against third parties under this Law at the time of the commencement of insolvency proceedings with respect to the grantor remains effective against third parties and retains the priority it had before the commencement of insolvency proceedings with respect to the grantor, unless another claim has priority pursuant to [the enacting State to specify its insolvency law].

[[2.] If a security right is effective against third parties at the time of commencement of insolvency proceedings with respect to the grantor, the secured creditor is entitled to take any action necessary to maintain the third-party effectiveness and priority the security right had before commencement of the insolvency proceedings.

[3.] An acquisition security right that is effective against third parties by the registration of a notice in the Registry after the commencement of insolvency proceedings with respect to the grantor and within the period specified in article 47, subparagraph (a)(ii), has the priority under this Law that it acquires as a result of such registration.]

[*Note to the Working Group: The Working Group may wish to note that paragraph 1 of this article is based on recommendation 4 of*

[1] This rule is an example for the consideration of enacting States that have a specialized registration regime.

the UNCITRAL Legislative Guide on Insolvency Law *and recommendations 238 and 239 of the* Secured Transactions Guide. *paragraph 2 is based on recommendation 238 of the* Secured Transactions Guide *(see A/CN.9/830, para. 87) and paragraph 3 is intended to state explicitly what is implicit in paragraph 1 of this article and article 47 of the draft Model Law. As these recommendations refer to what the insolvency law should provide, the Working Group may wish to consider whether this article should be deleted.*]

Article 45. Preferential claims

The following claims arising by operation of other law have priority over a security right that is effective against third parties but only up to [the enacting State to specify the amount for each category of claim]:

(a) [...];

(b) [...].[4]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) this article applies outside insolvency, while a similar rule is recommended in the* Secured Transactions Guide *with respect to preferential claims in the case of the grantor's insolvency (see rec. 239); (b) a notice with respect to preferential claims may be registered in the security rights registry; (c) in the case of enforcement, if a preferential creditor does not take over the enforcement process, its claim will have to be paid ahead of the claims of secured creditors; and (d) secured creditors should obtain representations from grantors about debts to preferential creditors and otherwise address the possible existence of such claims. The Guide to Enactment will also give examples of claims that may be listed in this article, such as claims of service providers or unpaid sellers or suppliers of goods (see A/CN.9/830, para. 89).*]

Article 46. Rights of judgement creditors

1. Subject to the rights of acquisition secured creditors in accordance with article 49, the rights of an unsecured creditor that has obtained a judgement or provisional order ("judgement creditor") have priority over a security right, if, before the security right is made effective against third parties, the judgement creditor [the enacting State to specify the steps necessary for a judgement creditor to acquire rights in the encumbered asset or to refer to the relevant provisions of other law with respect to judgements or provisional court orders].

2. The priority of the rights of the judgement creditor referred to in paragraph 1 does not extend to credit disbursed by the secured creditor:

(a) Within [the enacting State to specify a short period of time, such as 30 days] from the time the judgement creditor notified the secured creditor that it had taken the steps referred to in paragraph 1; or

(b) Pursuant to an irrevocable commitment in a fixed amount or an amount to be fixed pursuant to a specified formula of the secured creditor to extend credit, if the commitment was made before the judgement creditor notified the secured creditor that it had taken the steps referred to in paragraph 1.

[4] The enacting State will not need this article if it does not have any preferential claims.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that this article is intended to reflect recommendation 84 of the* Secured Transactions Guide. *The Guide to Enactment will also explain that, in some States, these steps involve registration of a notice in the security rights registry, seizure of assets or service of a garnishment order, matters that may be usefully clarified in the Guide to Enactment. In States that require registration of a notice with respect to these enforcement steps, judgement creditors have the same priority rights as secured creditors, that is, in other words, the general first-to-register priority rule applies. The Working Group may also wish to consider whether the judgement creditor should have priority under paragraph 2 of this article only if the secured creditor received the notification and, if so, whether this matter should be clarified in paragraph 2 of this article, another article for the receipt rule to apply throughout the draft Model Law or in the Guide to Enactment.*]

Article 47. Non-acquisition security rights competing with acquisition security rights[5]

Alternative A[6]

1. Except as provided in article 43 with respect to a security right that is made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any]:

(a) An acquisition security right in an asset other than inventory, consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business or used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority over a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or has acquired the asset; or

(ii) A notice with respect to the acquisition security right is registered in the Registry within [a short period of time, such as 30 days, to be specified by the enacting State] after the grantor obtains possession of or acquires the asset;

[5] This section includes the unitary-approach recommendations of the *Secured Transactions Guide*. If a State prefers to adopt the non-unitary approach recommendations, it may wish to consider implementing instead recommendations 187-202 of the *Secured Transactions Guide*. [In particular, States may wish to consider doing so if they have implemented regional legislation along the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (the "Late Payment Directive"), article 9 of which, provides that "Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods".]

[6] A State may adopt alternative A or alternative B of this article.

(b) An acquisition security right in inventory, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business has priority over a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or has acquired the asset; or

(ii) Before the grantor obtains possession of or acquires the asset:

a. A notice with respect to the acquisition security right registered in the Registry; and

b. A notice that is sent by the acquisition secured creditor is received by the non-acquisition secured creditor that has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind, stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right; and

(c) An acquisition security right in consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority over a competing non-acquisition security right created by the grantor in the same asset.

2. A notice that is sent in accordance with subparagraph 1(b)(ii)b. may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction and is sufficient only for security rights in assets of which the grantor obtains possession or which the grantor acquires within [a period of time, such as five years, to be specified by the enacting State] after the notice is received.

Alternative B

Except as provided in article 43:

(a) An acquisition security right in an asset other than consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority as against a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or acquires the asset; or

(ii) A notice with respect to the acquisition security right is registered in the Registry within [a short period of time, such as 30 days, to be specified by the enacting State] after the grantor obtains possession of or acquires the asset; and

(b) An acquisition security right in consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has

priority over a competing non-acquisition security right created by the grantor in the same asset.

[*Note to the Working Group: The Working Group may wish to note that subparagraph (b)(ii)b of this article refers to a notice received by an earlier registered inventory financier and consider whether the receipt rule should apply to any notice sent to a person under the draft Model Law.*]

Article 48. Competing acquisition security rights

1. Subject to paragraph 2, the priority between competing acquisition security rights is determined according to article 41.

2. An acquisition security right of a seller or lessor, or a licensor of intellectual property, that was made effective against third parties within the period specified in article 47, subparagraph (a)(ii), has priority over a competing acquisition security right of a secured creditor other than a seller or lessor, or a licensor of intellectual property.

Article 49. Acquisition security rights competing with the rights of judgement creditors

An acquisition security right that is made effective against third parties within the period specified in article 47, subparagraph (a)(ii), has priority over the rights of a judgement credit or that would otherwise have priority under article 46.

Article 50. Acquisition security rights in proceeds[7]

Alternative A

1. A security right in proceeds of an asset other than inventory, consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business or used or intended to be used by the grantor [primarily] for personal, family or household purposes, has the same priority as the acquisition security right in that asset.

2. A security right in proceeds of inventory, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business, has the same priority as the acquisition security right in that asset, except where the proceeds take the form of receivables, negotiable instruments, or rights to payment of funds credited to a bank account.

3. A security right in proceeds has the same priority as the security right in that asset, provided that the acquisition secured creditor notifies non-acquisition secured creditors that, before the proceeds arose, the acquisition secured creditor registered a notice with respect to assets of the same kind as the proceeds in the Registry.

[7] A State may adopt alternative A of this article, if it adopts alternative A of article 47, or alternative B of this article if it adopts alternative B of article 47.

Alternative B

Notwithstanding article 47, the priority of an acquisition security right in a tangible asset, intellectual property or rights of a licensee under a licence of intellectual property that is effective against third parties does not extend to its proceeds.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, as the draft Model Law does not deal with insolvency-related matters, with the exception of article 44, which may need to be deleted (see note to article 44), no article has been included in the draft Model Law to deal with the application of these special priority rules in the case of insolvency (rec. 186 of the* Secured Transactions Guide*). However, there is nothing in these articles to imply that insolvency law will not operate against the background of secured transactions law and thus that these provisions will not apply to acquisition security rights in the case of insolvency.*]

Article 51. Priority of a security right in the case of advance registration

The priority of a security right with respect to which a notice has been registered in the Registry before the conclusion of a security agreement or, in the case of a security right in a future asset, before the grantor acquires rights in the asset or the power to encumber it, is determined according to the time of registration.

[*Note to the Working Group: The Working Group may wish to note that this article has been included in the draft Model Law pursuant to a decision by the Working Group (see A/CN.9/830, para. 86).*]

Article 52. Subordination

1. A person may at any time subordinate its priority under this Law in favour of any existing or future competing claimant without the need for the beneficiary to be a party to the subordination.

2. Subordination does not affect the rights of competing claimants other than the person subordinating its priority and the beneficiary of the subordination.

[*Note to the Working Group: The Working Group may wish to consider whether a subordination agreement has to be in writing or may also be oral. The Working Group may also wish to consider whether the Guide to Enactment should explain whether, if third-party effectiveness of the security right has been established by registration of a notice, an amendment notice may be registered to reflect the new order of priority. The Working Group may also wish to note that the Guide to Enactment will explain that a subordination agreement may be between a secured creditor and a grantor, between two or more secured creditors, or between a secured creditor and another competing claimant (e.g. a judgement creditor or an insolvency representative). The Guide to Enactment will also discuss circular priority problems that may result from subordination agreements. The Working Group may wish to consider that the rule that an agreement cannot affect third parties is not enough to cover unilateral subordination and thus paragraph 2 of this article is necessary and should be retained.*]

Article 53. Future advances, future encumbered assets and maximum amount

1. Subject to the rights of judgement creditors under article 46, the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties.

2. The priority of a security right covers all encumbered assets described in a notice registered in the Registry, irrespective of whether they are acquired by the grantor or come into existence before or after the time of registration.

[3. The priority of the security right is limited to the maximum amount set out in the notice registered in the Registry.][8]

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 97-99 of the* Secured Transactions Guide.]

Article 54. Irrelevance of knowledge of the existence of a security right

Knowledge of the existence of a security right on the part of a secured creditor does not affect its priority under this Law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, although the fact that knowledge of the existence of a security right does not affect priority is clear from the priority rules of the draft Model Law, it is repeated in article 54 because of the need to emphasize the importance of determining priority on the basis of objective facts rather than subjective knowledge.*]

B. Asset-specific rules

Article 55. Negotiable instruments

1. A security right in a negotiable instrument that is made effective against third parties by possession of the instrument has priority over a security right in the instrument that is made effective against third parties by registration of a notice in the Registry.

2. A buyer or other consensual transferee of an encumbered negotiable instrument acquires its rights free of the security right that is made effective against third parties by registration of a notice in the Registry if the buyer or other consensual transferee:

(a) Qualifies as a protected holder [the enacting State may wish to use any other term used in its law]; or

(b) Takes possession of the negotiable instrument and gives value [the enacting State may wish to use any other term used in its law] without knowledge that the sale or other transfer is in violation of the rights of the secured creditor under the security agreement.

[8] This provision will be necessary if the enacting State implements article 6, subpara. 3(e), and 34, subpara. (e).

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that this article is based on recommendations 101 and 102 of the* Secured Transactions Guide *and any drafting changes are intended to ensure that paragraph 1 deals only with conflicts between security rights and paragraph 2 deals with the issue whether buyers or other transferees acquires its rights free or subject to a security right (see A/CN.9/830, para. 49) The Guide to Enactment will also explain that the reference to "good faith" has been deleted as the absence of knowledge amounted essentially to good faith and the concept of good faith is used in the draft Model Law only to reflect an objective standard of conduct (see A/CN.9/830, para. 50).*]

Article 56. Rights to payment of funds credited to a bank account

1. A security right in a right to payment of funds credited to a bank account that is made effective by the secured creditor becoming the account holder has priority over a competing security right that is made effective against third parties by any other method.

2. A security right in a right to payment of funds credited to a bank account of the depositary bank has priority over a competing security right made effective by any method other than by the secured creditor becoming the account holder.

3. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a control agreement has priority over a competing security right other than a security right of the depositary bank or a security right that is made effective against third parties by any method other than by the secured creditor becoming the account holder.

4. The order of priority among competing security rights in a right to payment of funds credited to a bank account that are made effective against third parties by control agreements is determined on the basis of the time of conclusion of the control agreements.

5. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a method other than registration of a notice in the Registry has priority over a competing security right made effective against third parties by such registration.

6. A depositary bank's right under other law to set off obligations owed to it by the grantor against the grantor's right to payment of funds credited to a bank account maintained with the depositary bank has priority as against a security right in the right to payment of funds credited to the bank account, except a security right that is made effective against third parties by the secured creditor becoming the account holder.

7. A transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the bank account, unless the transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

8. Paragraph 7 does not adversely affect the rights of transferees of funds from bank accounts under [the enacting State to specify the relevant law].

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that this article will apply to a priority conflict between a security right in a right to payment of funds credited to a bank account as original collateral and a security right in a right to payment of funds credited to a bank account as proceeds which, according to article 17, paragraph 1 (A/CN.9/WG.VI/WP.63), is automatically effective if the security right in the original collateral is effective against third parties.*]

Article 57. Money

1. A transferee of encumbered money acquires its rights free of the security right, unless that person has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

2. This article does not adversely affect the rights of persons in possession of money under [the enacting State to specify the relevant law].

Article 58. Negotiable documents and tangible assets covered

1. Subject to paragraph 2, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset has priority over a competing security right made effective against third parties by registration of a notice in the Registry or by possession of the negotiable document or the assets covered thereby.

2. Paragraph 1 does not apply to a security right in a tangible asset other than inventory if the security right of the secured creditor not in possession of the negotiable document was made effective against third parties before the earlier of:

(a) The time that the asset became covered by the negotiable document; and

(b) The time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document providing for the asset to be covered by a negotiable document so long as the asset became so covered within [a short period of time, such as 30 days, to be specified by the enacting State] from the date of the agreement.

3. A transferee of an encumbered negotiable document under [the enacting State to specify the relevant law] acquires its rights free of a security right in the negotiable document and the tangible assets covered thereby that is made effective against third parties by registration of a notice in the Registry or by possession of the documents or the assets covered thereby.

Article 59. Certain licensees of intellectual property

[Article 42, paragraph 6, does not affect any rights that a secured creditor may have [as an owner or licensor of intellectual property] under [the enacting State to specify the relevant law relating to intellectual property.]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will refer, with respect to this article, to the discussion of rights of certain licensees in the* Intellectual Property Supplement *(see paras. 193-212) and explain in particular that the ordinary course of business approach is not drawn from intellectual property law, which does not distinguish in this respect*

between an exclusive and non-exclusive licence but rather focuses on whether a licence is authorized or not and thus, for example, if the grantor does not have the right to grant licences, the licensee acquires its rights under the licence subject to the security right (see Intellectual Property Supplement, *paras. 200 and 201).*]

Article 60. Non-intermediated securities

1. A security right in certificated non-intermediated securities made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right by the same grantor in the same securities made effective against third parties by registration of a notice in the Registry.

2. A security right in uncertificated non-intermediated securities made effective against third parties by a notation of the security right or registration of the name of the secured creditor as the holder of the securities in the books maintained for that purpose by or on behalf of the issuer has priority over a security right in the same securities made effective against third parties by any other method.

3. A security right in uncertificated non-intermediated securities made effective against third parties by the conclusion of a control agreement has priority over a security right in the same securities made effective against third parties by registration of a notice in the Registry.

4. Priority among security rights in uncertificated non-intermediated securities made effective against third parties by the conclusion of control agreements is determined according to the temporal order in which the control agreements were concluded.

Option A

5. This article does not adversely affect the rights of holders of non-intermediated securities under [the enacting State to specify the relevant law relating to the transfer of securities].

Option B

5. A buyer or other consensual transferee of encumbered non-intermediated securities under [the enacting State to specify the relevant law relating to the transfer of securities] acquires its rights free of the security right.

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Addendum

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Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Rights and obligations of the parties to a security agreement

A. General rules

Article 61. Source of rights and obligations of the parties

Subject to the provisions of this Law, the mutual rights and obligations of the parties to a security agreement are determined by:

(a) The terms and conditions set forth in the security agreement, including any rules or general conditions referred to therein; and

(b) Any usage to which the parties to the security agreement have agreed and any practices they have established between themselves.

[*Note to the Working Group: The Working Group may wish to note that this article: (a) is based on article 11 of the* United Nations Assignment Convention *(which in turn is based on article 9 of the* United Nations Convention on Contracts for the International Sale of Goods *(CISG)) and recommendation 110 of the* Secured Transactions Guide*; (b) is intended to reiterate the principle that the parties to the security agreement may structure their agreement in any way they wish to meet their particular needs (as is done in articles 6 and 11 of the* United Nations Assignment Convention*, but not in articles 6 and 9 of the* CISG*); and (c) is intended to give legislative strength to trade usages agreed upon by the parties and trade practices established between them. The Working Group may also wish to note the Guide to Enactment will explain that the principle that a person challenging the effectiveness of the agreement on the ground that is inconsistent with the provisions of this article has the burden of proof.*]

Article 62. Obligation of a person in possession to preserve an encumbered asset

A [party to a security agreement] [secured creditor] in possession of an encumbered asset must take reasonable steps to preserve the asset and its value.

[*Note to the Working Group: The Working Group may wish to consider whether the secured creditor only or also the grantor should be obliged to preserve the encumbered asset, depending on whether the secured creditor or the grantor has possession. In any case, this article should not result in preventing the grantor from selling the asset or in making it possible for the grantor to avoid this duty by relinquishing possession. Similarly, how this article would apply would depend on the particular circumstances. For example, if the cost of preserving the encumbered asset exceeds its value, the secured creditor would normally not only relinquish possession but take other steps to address the lack of security. These matters could be addressed in the Guide to Enactment. The Working Group may also wish to consider how the obligation of the secured creditor to take reasonable steps to preserve the encumbered asset would apply in the case of intangible assets. In that connection, the Working Group may wish to consider whether imposing such an obligation on a secured creditor where the encumbered assets are*

non-intermediated securities runs counter to the right of use of the secured creditor under article 5(1) of the Financial Collateral Directive (same issue in article 63 below).]

Article 63. Obligation of a secured creditor to return an encumbered asset or to register a cancellation notice

If the secured obligation has been fully performed and there is no further commitment by the secured creditor to extend credit secured by the encumbered assets, subject to any rights of subrogation in favour of the person performing the secured obligation, the security right is extinguished and the secured creditor must return an encumbered asset in its possession to the grantor, or register a cancellation notice as provided in article 39, paragraph 1.

[*Note to the Working Group: The Working Group may wish to consider whether this article or the Guide to Enactment should address the obligation of an assignee to withdraw the notification to the debtor of the receivable. The Working Group may wish to consider whether a new article should be added allowing a secured creditor to return equivalent non-intermediated securities to replace the originally encumbered non-intermediated securities (see art. 5(2) of the Financial Collateral Directive).*]

Article 64. Rights of a secured creditor with respect to an encumbered asset

1. A secured creditor in possession of an encumbered asset has the right:

(a) To be reimbursed for reasonable expenses incurred for the preservation of the asset in accordance with article 62;

(b) To make reasonable use of the asset; and

(c) To apply the monetary proceeds of the asset to the payment of the secured obligation.

2. A secured creditor has the right to inspect an encumbered asset in the possession of the grantor [at all reasonable times] [in a reasonable manner].

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text in paragraph 2 of this article should be deleted as the obligation of the parties to exercise their rights and perform their obligations in good faith and in a commercially reasonable manner is already addressed in article 5 dealing with the general standard of conduct (A/CN.9/WG.VI/WP.63).*]

B. Asset-specific rules

Article 65. Representations of the grantor

1. The grantor represents at the time of conclusion of the security agreement that:

(a) The grantor has the right [or the power] to create a security right in the receivable;

(b) The grantor has not previously created a security right in the receivable in favour of another secured creditor; and

(c) The debtor of the receivable does not and will not have any defences or rights of set-off.

2. The grantor does not represent that the debtor of the receivable has, or will have, the ability to pay.

[*Note to the Working Group: The Working Group may wish to note that the reference to contrary agreement of the parties in the chapeau of paragraph 1 and in paragraph 2 (and articles 66 and 67 below) has been deleted, as this article is not among those mandatory law provisions set out in article 4, paragraph 1 (A/CN.9/WG.VI/WP.63). The Working Group may also wish to consider whether the bracketed text in subparagraph 1 (a) should be retained as, in the case where a security right is created in a receivable in breach of a contractual limitation, formally speaking, the grantor would not have the "right" but only the "power" to create a security right.*]

Article 66. Right of the grantor or the secured creditor to notify the debtor of the receivable

1. The grantor or the secured creditor or both may send the debtor of the receivable notification of the security right and a payment instruction, but after notification of the security right has been sent only the secured creditor [and received by the debtor of the receivable] may send a payment instruction.

2. Notification of a security right or of a payment instruction sent in breach of an agreement referred to in paragraph 1 is not ineffective for the purposes of article 72, but nothing in this article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.

[*Note to the Working Group: The Working Group may wish to consider the bracketed wording in paragraph 1 of this article, which deals with the question whether the notification should be only sent by the secured creditor or also received by the debtor of the receivable (this issue arises also in articles 67 and 72 below).*]

Article 67. Right of the secured creditor to payment

1. As between the grantor and the secured creditor, whether or not notification of the security right has been sent, the secured creditor is entitled:

(a) To retain the proceeds of any payment made to the secured creditor and tangible assets returned to the secured creditor in respect of the encumbered receivable;

(b) To the proceeds of any payment made to the grantor and also to any tangible assets returned to the grantor in respect of the encumbered receivable; and

(c) To the proceeds of any payment made to another person and tangible assets returned to such person in respect of the encumbered receivable, if the right of the secured creditor has priority over the right of that person.

2. The rights of the secured creditor in accordance with paragraph 1 are limited to the value of the secured obligation.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that articles 65-67 are based on*

recommendations 114-116 of the Secured Transactions Guide, *which in turn are based articles 12-14 of the* United Nations Assignment Convention. *The changes made are intended to clarify without changing the substance of these articles.*]

Article 68. Right of the secured creditor to preserve the encumbered intellectual property

An agreement between the grantor and the secured creditor that the secured creditor is entitled to take steps to preserve encumbered intellectual property is effective.

[*Note to the Working Group: The Working Group may wish to consider that, while articles 4 (party autonomy) and 62 (obligation to preserve an encumbered asset), may be generally sufficient to ensure that the secured creditor may take steps necessary to preserve encumbered intellectual property, this article is necessary as these rights are normally rights of the intellectual property owner (e.g. to renew a patent registration or pursue infringers).*]

Section II. Rights and obligations of third-party obligors

A. Receivables

Article 69. Protection of the debtor of the receivable

1. Except as otherwise provided in this Law, the creation of a security right in a receivable does not affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the contract giving rise to the receivable, without its consent.

2. A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:

(a) The currency of payment specified in the original contract; or

(b) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor of the receivable is located.

Article 70. Notification of a security right in a receivable

1. Notification of a security right in a receivable or a payment instruction is effective when received by the debtor of the receivable if it reasonably identifies the encumbered receivable and the secured creditor and is in a language that is reasonably expected to inform the debtor of the receivable about its contents.

2. It is sufficient if a notification of the security right or a payment instruction is in the language of the contract giving rise to the receivable.

3. Notification of a security right in a receivable or a payment instruction may relate to receivables arising after notification.

4. Notification of a subsequent security right in a receivable constitutes notification of all prior security rights.

Article 71. Discharge of the debtor of the receivable by payment

1. Until the debtor of the receivable receives notification of a security right in a receivable, it is discharged by paying in accordance with the original contract.

2. After the debtor of the receivable receives notification of a security right in a receivable, subject to paragraphs 3-8, it is discharged only by paying the secured creditor or, if otherwise instructed in the notification or subsequently by the secured creditor in a writing received by the debtor of the receivable, in accordance with the payment instruction.

3. If the debtor of the receivable receives more than one payment instruction relating to a single security right of the same receivable created by the same grantor, it is discharged by paying in accordance with the last payment instruction received from the secured creditor before payment.

4. If the debtor of the receivable receives notification of more than one security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the first notification received.

5. If the debtor of the receivable receives notification of one or more subsequent security rights in the same receivable, it is discharged by paying in accordance with the notification of the last of such subsequent security rights.

6. If the debtor of the receivable receives notification of the security right in a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this article as if the debtor of the receivable had not received the notification.

7. If the debtor of the receivable receives a notification as provided in paragraph 6 and pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.

8. If the debtor of the receivable receives notification of a security right in a receivable from a subsequent secured creditor, it is entitled to request the secured creditor to provide within a reasonable period of time adequate proof that the security right created by the initial grantor to the initial secured creditor and any intermediate security right have been created and, unless the secured creditor does so, the debtor of the receivable is discharged by paying in accordance with this article as if it had not received notification of the security right.

9. Adequate proof of a security right referred to in paragraph 8 includes but is not limited to any writing emanating from the grantor and indicating that a security right has been created.

10. This article does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor of the receivable.

Article 72. Defences and rights of set-off of the debtor of the receivable

1. Unless otherwise agreed in accordance with article 73, in a claim by the secured creditor against the debtor of the receivable for payment of the encumbered receivable, the debtor of the receivable may raise against the secured creditor:

(a) All defences and rights of set-off arising from the contract giving rise to the receivable, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the security right had not been created and the claim were made by the grantor; and

(b) Any other right of set-off that was available to the debtor of the receivable at the time it received notification of the security right.

2. Notwithstanding paragraph 1, the debtor of the receivable may not raise as a defence or right of set-off against the grantor breach of an agreement referred to in article 12, paragraph 2, limiting in any way the initial or subsequent grantor's right to create the security right.

Article 73. Agreement not to raise defences or rights of set-off

1. Subject to paragraph 3, the debtor of the receivable may agree with the grantor in a writing signed by the debtor of the receivable not to raise against the secured creditor the defences and rights of set-off referred to in article 72.

2. The agreement referred to in paragraph 1 may be modified only by an agreement in a writing signed by the debtor of the receivable [and its effectiveness against the secured creditor is subject to article 72, paragraph 2].

3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the debtor of the receivable.

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed sentence in paragraph 2 is necessary.*]

Article 74. Modification of the original contract

1. An agreement concluded before notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is effective as against the secured creditor, and the secured creditor acquires corresponding rights.

2. An agreement concluded after notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is ineffective as against the secured creditor unless:

(a) The secured creditor consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable secured creditor would consent to the modification.

3. Paragraphs 1 and 2 do not affect any right of the grantor or the secured creditor arising from breach of an agreement between them.

Article 75. Recovery of payments made by the debtor of the receivable

1. The failure of the grantor to perform the contract giving rise to a receivable does not entitle the debtor of the receivable to recover from the secured creditor a sum paid by the debtor of the receivable to the grantor or the secured creditor.

2. Paragraph 1 does not affect any rights that the debtor of the receivable may have against the grantor under other law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that articles 69-75 of the draft Model Law are based on recommendations 117-123 of the* Secured Transactions Guide, *which in turn are based on articles 15-21 of the* United Nations Assignment Convention. *Paragraph 1 of this article is based on recommendation 123 of the* Secured Transactions Guide *and article 21 of the* United Nations Assignment Convention. *Paragraph 2 has been added to clarify that this article is not intended to deprive the debtor of the receivable of any rights it might have under other law to seek recovery of payments from its contractual partner, that is, the grantor assignor.*]

B. Negotiable instruments

Article 76. Rights as against the obligor under a negotiable instrument

The rights of a secured creditor that has a security right in a negotiable instrument as against the person obligated on the negotiable instrument are subject to [the enacting State to specify the relevant law relating to negotiable instruments].

[*Note to the Working Group: The Working Group may wish to adopt in this article the same wording it may adopt in article 60, in paragraph 5.*]

C. Rights to payment of funds credited to a bank account

Article 77. Rights and obligations of the depositary bank

1. The creation of a security right in a right to payment of funds credited to a bank account does not affect the rights and obligations of the bank with which that bank account is maintained without its consent, nor does it obligate the depositary bank to provide any information about that bank account to third parties.

2. Any rights of set-off that the depositary bank may have under [the enacting State to specify relevant law relating to rights of set-off] are not affected by any security right that the bank may have in a right to payment of funds credited to a bank account maintained with the bank.

D. Negotiable documents and tangible assets covered by a negotiable document

Article 78. Rights as against the issuer of a negotiable document

The rights of a secured creditor that has a security right in a negotiable document as against the issuer of the document or any other person obligated on the document are subject to [the enacting State to specify the relevant law relating to negotiable documents].

E. Non-intermediated securities

Article 79. Rights as against the issuer of a non-intermediated security

The rights of a secured creditor that has a security right in non-intermediated securities as against the issuer of the securities are subject to [the enacting State to specify the relevant law relating to the obligations of the issuer of non-intermediated securities].

Chapter VII. Enforcement of a security right

A. General rules

Article 80. Post-default rights

1. After default, the grantor is entitled to exercise one or more of the following rights:

(a) Pay or otherwise perform in full the secured obligation and obtain a release from the security right of all encumbered assets;

(b) Apply to a court or other authority for relief if the secured creditor is not complying with its obligations under the provisions of this Law;

(c) Propose to the secured creditor, or reject the proposal of the secured creditor, that the secured creditor acquire an encumbered asset in total or partial satisfaction of the secured obligation; and

(d) Exercise any other right provided in the security agreement or any other law.

2. After default, the secured creditor is entitled to exercise one or more of the following rights:

(a) Obtain possession of a tangible encumbered asset;

(b) Sell or otherwise dispose of, lease or license an encumbered asset;

[(c) In the case of a security right in all assets of a grantor, sell or otherwise dispose of the grantor's business as a going concern;]

[(d)] Propose that it acquire an encumbered asset in total or partial satisfaction of the secured obligation; and

[(e)] Exercise any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Law.

3. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible.

4. Subject to article 5, the exercise of a post-default right with respect to an encumbered asset does not prevent the exercise of a post-default right with respect to the secured obligation, and vice versa.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 139, 141, 143 and 144 of the* Secured Transactions Guide. *The Working Group may also wish to consider subparagraph 2 (c), which introduces a new right of a secured creditor with a security right in all assets of a grantor. This new provision, which appears within square brackets for the consideration of the Working Group, is intended to state explicitly what was implicit in recommendation 132 of the* Secured Transactions Guide *(the thrust of which is included in article 5 of the draft Model Law), namely that, if it is commercially reasonable (e.g. maximizes the value of the grantor's estate), a secured creditor with a security right in all assets of a business may sell the business as a going concern, rather than sell the encumbered assets one by one. The Working Group may wish to note that the Guide to Enactment will clarify that this section deals with post-default rights applicable to security rights in all types of asset, while the asset-specific section refers to additional post-default rights applicable to security rights in specific types of asset, such as receivables.*]

Article 81. Waiver of post-default rights

1. The grantor and any other person that owes payment or other performance of the secured obligation may not waive unilaterally or vary by agreement any of its rights under the provisions of this chapter before default.

2. The secured creditor may waive unilaterally or vary by agreement any of its rights under the provisions of this chapter.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of this article is necessary in view of article 5 dealing with party autonomy (A/CN.9/WG.VI/WP.63).*]

Article 82. Judicial and extrajudicial methods of exercising post-default rights

1. The secured creditor may exercise its post-default rights judicially or extrajudicially.

2. Judicial exercise of the secured creditor's post-default rights is subject to [the civil procedure rules to be specified by the enacting State].

3. Extrajudicial exercise of the secured creditor's post-default rights is subject to articles 5 and 87-90.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will include wording along the lines of recommendation 138 of the* Secured Transactions Guide *to emphasize the importance of expeditious judicial*

proceedings and extrajudicial proceedings for the availability and the cost of credit.]

Article 83. Judicial or other official relief of the grantor for non-compliance by the secured creditor

The debtor, the grantor or any other interested person is entitled to court relief [or other official relief to be specified by the enacting State], including [the enacting State to specify expeditious court proceedings], if the secured creditor fails to comply with its obligations when enforcing the security right judicially or extrajudicially in accordance with article 82.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that "other official relief to be specified by the enacting State" may include relief by an arbitral tribunal, chamber of commerce or notary public, if there is an agreement to that effect between the grantor and the secured creditor that is enforceable under the law of the enacting State. The Guide to Enactment: (a) will also explain that in such a case the law of the enacting State must provide protection for the rights of persons, who are not party to such an agreement, in the encumbered assets; (b) discuss types of expedited judicial proceeding; and (c) give examples of "interested persons", such as a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets. In particular with respect to resolution of enforcement-related disputes by arbitration, the Guide to Enactment will also make reference to the need for the law to ensure that third-party creditors are notified (e.g. before an extra-judicial sale takes place under article 88) and given an opportunity to assert their rights (e.g. their right to take over enforcement under article 85 or be paid from the proceeds of a sale according to their priority rank under this law under article 90).*]

Article 84. Grantor's right of redemption

1. The debtor, the grantor or any other interested person is entitled to redeem the encumbered asset by paying or otherwise performing the secured obligation in full, including payment of interest and the cost of enforcement.

2. This redemption right may be exercised until the asset is sold or otherwise disposed of, leased or licensed, acquired or collected by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

Article 85. Right of higher-ranking secured creditor to take over enforcement

1. Notwithstanding commencement of enforcement by another competing claimant creditor, a secured creditor whose security right has priority over that of the enforcing creditor is entitled to take over the enforcement process at any time before the asset is sold or otherwise disposed of, leased, licensed, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

2. The right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any method available to a secured creditor under this Law.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of this article may be deleted, as it seems to be stating the obvious, namely that a secured creditor taking over the enforcement process has the same post-default rights that any secured creditor has.*]

Article 86. Secured creditor's right to possession

After default, the secured creditor is entitled to possession of a tangible encumbered asset.

Article 87. Extrajudicial repossession of encumbered assets

[1.] The secured creditor is entitled to obtain possession of an encumbered asset without applying to a court or other authority if all of the following conditions are satisfied:

(a) The grantor has consented in the security agreement to the secured creditor obtaining possession without applying to a court or other authority;

(b) The secured creditor has given the grantor and any person in possession of the encumbered asset [or owing payment or other performance of the secured obligation] notice of default and of the secured creditor's intent to obtain possession without applying to a court or other authority within [a short period of time, such as 15 days, to be specified by the enacting State] days after notice is [sent] [received]; and

(c) At the time the secured creditor seeks to obtain possession of the encumbered asset, the grantor or any other person in possession of the encumbered asset does not object.

[2. The notice referred to in subparagraph 1 (b) need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.]

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in subparagraph 1 (b) (the first of which is intended to ensure that notice is given to any person owing payment of the secured obligation, and the last of which is intended to raise the issue whether it is sufficient if the notice is sent or whether it is required that the notice be received) and paragraph 2 of this article (which is intended to reflect the rule in article 89, paragraph 6, according to which no notice is required if the encumbered assets are perishable goods).*]

Article 88. Extrajudicial disposition of encumbered assets

1. After default, a secured creditor is entitled to sell or otherwise dispose of, lease, or license an encumbered asset without applying to a court or other authority.

2. Subject to article 5, a secured creditor that exercises the right referred to in paragraph 1 may select the method, manner, time, place and other aspects of the sale or other disposition, lease or licence.

Article 89. Advance notice of extrajudicial disposition of encumbered assets

1. After default, the secured creditor must give notice of its intention to sell or otherwise dispose of, lease or license an encumbered asset in accordance with article 88.

2. The notice referred to in paragraph 1 must be given to:

(a) The grantor and any debtor;

(b) Any person with rights in the encumbered asset that notifies in writing the secured creditor of those rights, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the notice is [sent to] [received by] the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the notice is [sent to] [received by] the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time when the enforcing secured creditor took possession of the asset.

3. The notice must be given at least [a short period of time, such as 15 days, to be specified by the enacting State] before extrajudicial disposition takes place and must contain a description of the encumbered assets, a statement of the amount required to satisfy the secured obligation including interest and the cost of enforcement, a reference to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 84 and a statement of the date after which the encumbered asset will be sold or otherwise disposed of, leased or licensed, the time and place of a public disposition, and the manner of the intended disposition.

4. The notice must be in a language that is reasonably expected to inform its recipients about its contents.

5. It is sufficient if the notice to the grantor is in the language of the security agreement.

6. The notice need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.

[*Note to the Working Group: The Working Group may wish to note that no text has been included in this article to reflect recommendation 150 of the* Secured Transactions Guide, *as that recommendation is aspirational and does not fit in model law but could be discussed in the commentary.*]

Article 90. Distribution of proceeds of disposition of encumbered assets

1. In the case of extrajudicial disposition of an encumbered asset:

(a) [Subject to the rights of holders of preferential claims under article 45,] the enforcing secured creditor must apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation;

(b) Except as provided in subparagraph 1 (c), the enforcing secured creditor must pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of its claim,

to the extent of the amount of that claim, and remit any balance remaining to the grantor; and

(c) Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the enforcing secured creditor may, in accordance with generally applicable procedural rules, pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified by the enacting State] for distribution in accordance with the provisions of this Law on priority.

2. Distribution of the proceeds realized by a judicial disposition or other officially administered enforcement process is to be made pursuant to [the civil procedure rules to be specified by the enacting State], but in accordance with the priority provisions of this Law.

3. A debtor remains liable for any shortfall owing after application of the net proceeds of enforcement to the secured obligation.

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in subparagraph 1 (a), which raises the issue of payments to preferential creditors that have to be paid ahead of secured creditors. Alternatively, the net proceeds may be defined as proceeds after the payment of any preferential claims or left to the civil procedure rules of the enacting State referred to in paragraph 2. The Working Group may wish to consider whether a new article should be added in the draft Model Law to deal with liability for damages for non-compliance with enforcement obligations (see Secured Transactions Guide, rec. 136). Such a new article could read along the following lines: 1. If a person violates its obligations under the provisions of this chapter, the person to whom the obligation is owed has a right to recover loss or damage resulting from that violation. 2. If the secured obligation arises from a transaction entered into by an individual for personal, family or household purposes, and the secured creditor violates its obligations under the provisions of this chapter, the person to whom the obligation is owed is deemed to have suffered damages not less than [the enacting State to specify a minimum amount in regulations or a method for determining a minimum amount in its law].*]

Article 91. Acquisition of encumbered assets in satisfaction of the secured obligation

1. After default, the secured creditor may propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

2. The proposal must be sent to:

(a) The grantor, the debtor and any other person that owes payment or other performance of the secured obligation, including a guarantor;

(b) Any person with rights in the encumbered asset that has notified in writing the secured creditor of those rights, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the proposal is [sent to] [received by] the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time such as 15 days to be specified by the enacting State] before the proposal is [sent to] [received by] the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time the secured creditor took possession.

3. The proposal must specify the amount owed as of the date the proposal is sent, including interest and the cost of enforcement, and the amount of the obligation that is proposed to be satisfied by acquiring the encumbered asset, describe the encumbered asset, refer to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 84, and state the date after which the encumbered asset will be acquired by the secured creditor.

4. The secured creditor may acquire the encumbered asset as provided in paragraph 1, unless the secured creditor receives an objection in writing from any person entitled to receive such a proposal within [a short period of time such as 15 days to be specified by the enacting State] after the proposal is [sent to] [received by] the grantor.

5. In the case of a proposal for the acquisition of the encumbered asset in partial satisfaction, affirmative consent by each addressee of the proposal is necessary.

6. The grantor may make such a proposal and if the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-5.

[*Note to the Working Group: The Working Group may wish to note that, a contrario, paragraph 5 of this article means that, in the case of full satisfaction of the secured obligation, affirmative consent by each addressee of the proposal is not needed; it is sufficient if each addressee does not object in a timely fashion (see* Secured Transactions Guide, *ch. VIII, para. 70). The Working Group may wish to consider this matter and whether it should be addressed in this article explicitly or only discussed in the Guide to Enactment.*]

Article 92. Rights acquired through judicial disposition of encumbered assets

If a secured creditor sells or otherwise disposes of, leases or licenses, an encumbered asset through a judicial [or other officially administered] process, the transferee, lessee or licensee acquires the asset [the enacting State to specify whether the transferee, lessee or licensee acquires its rights subject to or free of any rights].

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will give examples of other officially administered processes (e.g. before a chamber of commerce or notary public).*]

Article 93. Rights acquired through extrajudicial disposition of encumbered assets

1. If a secured creditor sells or otherwise disposes of an encumbered asset without applying to a court or other authority, a person that acquires the grantor's right in the asset acquires its rights free of the rights of the enforcing secured creditor and any competing claimant whose right has a lower priority than that of

the security right of the enforcing secured creditor, but subject to the rights that have priority over the security right of the enforcing secured creditor.

2. If a secured creditor leases or licenses an encumbered asset without applying to a court or other authority, a lessee or licensee is entitled to the benefit of the lease or licence during its term, except as against rights that have priority over the right of the enforcing secured creditor.

3. If the secured creditor sells or otherwise disposes of, leases or licenses the encumbered asset not in accordance with the provisions of this chapter, a buyer or other transferee, lessee, or licensee of the encumbered asset acquires the rights or benefits described in paragraphs 1 and 2, provided that [it had no knowledge of a violation of the provisions of this chapter that materially prejudiced the rights of the grantor or another person and this lack of knowledge was not the result of reckless behaviour].

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in paragraph 3, which is intended to implement the decision of the Working Group that the words "good faith acquirer, lessee or licensee" used in a previous version of paragraph 3 of this article (based on recommendation 163 of the* Secured Transactions Guide) *should be replaced by wording that would neither require only knowledge of non-compliance with a rule on enforcement nor go as far as to require collusion between the secured creditor and the acquirer (see A/CN.9/802, para. 31).*]

B. Asset-specific rules

Article 94. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security

1. After default, a secured creditor with a security right in a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security is also entitled to collect payment from the debtor of the receivable, obligor under the negotiable instrument, depositary bank or issuer of the non-intermediated securities.

2. The secured creditor may exercise the right provided for in paragraph 1 even before default but with the agreement of the grantor.

3. A secured creditor exercising the right referred to in paragraph 1 or 2 is also entitled to enforce any personal or property right that secures or supports payment of the encumbered asset.

4. If a security right in a right to funds credited to a bank account has been made effective against third parties by registration of a notice, the secured creditor is entitled to collect or otherwise enforce its security only pursuant to a court order, unless the depositary bank agrees otherwise.

5. The right of the secured creditor to collect under paragraphs 1 to 4 is subject to articles 68-75.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that the asset-specific post-default rules are*

applicable to security rights in specific types of asset, while the general post-default rules apply to security rights in all types of asset. The Working Group may wish to note that the Guide to Enactment will clarify that, once inventory is converted to a receivable, a receivable is paid into a bank account, a check is issued on the basis of that account and new inventory is bought, depending on the form of the encumbered asset during the enforcement of the security right, different rules might apply to the enforcement of that security right. The Working Group may wish to consider the application of this article to checks and bills of exchange. The Working Group may also wish to consider whether the conditions set out in article 87 for the out-of-court repossession of an encumbered tangible asset should also apply to out-of-court collection of a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security. In this regard, the Working Group may wish to note that, unless the conditions for the out-of-court collection of payment under such an asset are specifically regulated and the grantor's right to due process is specifically protected, the out-of-court collection may run counter to constitutional guarantees of due process.]